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No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

S. SIMCHA GOLDMAN,
Petitioner,

v.

CASPER W. WEINBERGER,
SECRETARY OF DEFENSE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATHAN LEWIN
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
DAVID J. BUTLER
BROWNSTEIN ZEIDMAN & SCHOMER
1025 Connecticut Avenue, N.W.,
Suite 900
Washington, D.C. 20036
(202) 457-6500
Attorneys for Petitioner

Of Counsel:
DENNIS RAPPS
NATIONAL JEWISH COMMISSION
ON LAW AND PUBLIC AFFAIRS
450 Seventh Avenue, Suite 2203
New York, NY 10001
(212) 563-0100

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52 pp

QUESTION PRESENTED

Whether the Air Force may constitutionally prohibit an Orthodox Jewish psychologist from wearing a "yarmulke"—an unobtrusive skullcap which is part of his religious observance —while he is in uniform on duty at a military hospital.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-20a, *infra*) is reported at 734 F.2d 1531. The opinion of the district court (Pet. App. C, pp. 28a-34a, *infra*) is reported at 530 F. Supp. 12.

JURISDICTION

The decision of the court of appeals was issued on May 8, 1984. On August 10, 1984, the court of appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* (Pet. App. B, pp. 21a-27a, *infra*). On November 1, 1984, Chief Justice Burger extended the time for filing a petition for a writ of certiorari to and including December 10, 1984 (Pet. App. D, p. 37a, *infra*). On December 3, 1984, Chief Justice

Burger further extended the time within which to file a petition for a writ of certiorari to and including January 7, 1985 (Pet. App. E, p. 38a, *infra*). The jurisdiction of this Court rests on 28 U.S.C. § 1254.

STATEMENT

Petitioner is an Orthodox Jew who received rabbinical training and was ordained as a rabbi in 1970 (J.A. 189).[1] He served for two years as a chaplain in the United States Navy, and thereafter decided to study clinical psychology (J.A. 191-92). He enrolled in the Armed Forces Health Professions Scholarship Program and took courses in clinical psychology at Loyola University of Chicago. In September 1979, after graduating with a Ph.D. in psychology, petitioner entered on active duty with the Air Force, as a clinical psychologist, at March Air Force Base in California (J.A. 193-95).

From the time of his initial Air Force enrollment until early 1981—when he testified as a defense witness in a formal court-martial—petitioner kept his head covered, as is traditional among Orthodox Jews,[2] at all times, including the hours when he was on duty at the Air Force hospital (J.A. 181, 198-203). When he was out of doors, petitioner wore the regulation Air Force cap. When indoors, where the wearing of the cap is prohibited by Air Force regulations (AFR 35-10 § 1-6(h)(2)(f)), he wore a "yarmulke"—a dark-colored skull-cap measuring approximately 5½ inches in diameter (J.A. 250).

During this entire period of more than three-and-one-half years, petitioner received consistently outstanding performance ratings for his military service (J.A. 225-26, 256-67). No complaints concerning his yarmulke were received. Nor was

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[1] "J.A." denotes the Joint Appendix filed in the court of appeals.

[2] The *bona fides* of petitioner's religious beliefs and the fact that it is part of Orthodox Jewish practice for males to wear a head covering at all times were admitted by the government in the district court. Specifically, the Air Force admitted that "[i]t is a well-established tradition and practice among adherents to Orthodox Judaism that males keep their heads covered at all times" (J.A. 180).

there any other suggestion that his variance from Air Force dress regulations had any harmful effect on his execution of his duties or on anyone else's performance (J.A. 226-27).

In April 1981 petitioner testified as a witness for the defense in a court-martial while wearing his yarmulke. Adverse counsel then made a complaint against him to the hospital commandant (J.A. 23). On May 8, 1981, petitioner was told by the commandant that by wearing a yarmulke while on duty he violated the Air Force Dress Code, AFR 35-10, and that he would no longer be permitted to commit this violation outside the hospital (J.A. 24). Less than two months later—after there had been discussion between an attorney representing petitioner and the Office of the Air Force General Counsel—the commandant revised his order to prohibit petitioner from wearing a yarmulke anywhere, including the hospital (J.A. 25-26). On the following day, petitioner was given a formal letter of reprimand and threatened with additional sanctions, including a court-martial, if he did not cease wearing his yarmulke while in uniform (J.A. 183).

Petitioner promptly instituted this action for injunctive relief and damages. The district court entered a temporary restraining order and, after a hearing that was consolidated with a trial on the merits, issued an injunction sustaining petitioner's constitutional right to keep his head covered notwithstanding the Air Force regulation (pp. 35a-36a, *infra*). Acknowledging that military discipline "may render permissible within the military that which would be constitutionally impermissible outside it," the district court noted that "deference does not mean abdication" (p. 33a, *infra*). Having heard the testimony of expert witnesses and such explanation as the Air Force gave for its refusal to grant an exemption from its dress code for petitioner's religiously motivated wearing of a yarmulke, the district court concluded that no "reasoned and deliberate" analysis supported the Air Force's prohibition (p. 33a, *infra*). The district court enjoined the defendants from applying AFR 35-10 to petitioner "insofar as it relates to his wearing a yarmulke for religious reasons," ordered the expungement from petitioner's military records of all negative references relating to his wearing of a yarmulke,

and awarded damages for pay lost as a result of the commandant's illegal order (pp. 35a-36a, *infra*).[3]

The court of appeals reversed. It held that the constitutionality of the Air Force's action was to be judged not by the standard of *Sherbert* v. *Verner*, 374 U.S. 398 (1963), but by the standard of *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), because the case "does involve a clash between constitutionally guaranteed individual rights and constitutionally authorized military power" (p. 15a, *infra*). The court said that no balancing of governmental and individual interests was required, but that the constitutional inquiry was "whether legitimate military ends are sought to be achieved by means designed to accommodate the individual right to an appropriate degree" (p. 11a, *infra*). Although the court found various of the Air Force's justifications for barring a yarmulke in a military hospital "unpersuasive" (p. 16a, *infra*) or "weak" (p. 17a, *infra*), and acknowledged that petitioner's responsive arguments had "some force" (*id.*), the court concluded that "the peculiar nature of the Air Force's interest in uniformity renders the strict enforcement of its regulation permissible" (p. 19a, *infra*). The court held that although the dress regulations are "necessarily arbitrary," they may be enforced "not for the sake of the regulations themselves, but for the sake of enforcement" (*id*).

Three Circuit Judges dissented from the denial of a petition for rehearing. Circuit Judge Starr said that notwithstanding the deference due the military in matters relating to military affairs, the panel's decision "abdicates the judiciary's limited but important function in the extraordinarily delicate environment of military personnel" (p. 23a, *infra*). He characterized the Air Force's treatment of petitioner as "patently unconscionable," noting that neither expert testimony nor common sense justified

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[3] Petitioner had applied for an extension of his active duty with the Air Force prior to the events of May 1981. Although the commandant initially recommended that his application be granted, he withdrew that recommendation once the issue over petitioner's yarmulke arose (J.A. 219-20). Petitioner's application was then denied. Another action has been filed for damages resulting from this denial. *Goldman* v. *Secretary of Defense*, D.D.C. No. 81-3197. That action is awaiting the final outcome of this case.

the conclusion that other servicemen would resent a dress code exception for sincere religious beliefs (pp. 25a-26a, *infra*). Circuit Judges Ginsburg and Scalia agreed with Judge Starr's dissent on the ground that the First Amendment required accommodation to petitioner's spiritual needs (p. 27a, *infra*).

REASONS FOR GRANTING THE WRIT

The court of appeals has sanctioned a direct governmental restraint on a serviceman's free exercise of his religion for no reason other than "the Air Force's interest in uniformity." That judgment conflicts not only with the doctrine repeatedly applied by this Court to protect observances by religious minorities from actions taken by civilian authorities, but also with this Court's warnings that judicial deference to military authority should not, in the area of constitutional rights, turn into abdication of independent judicial responsibility. This case is unlike any Religion Clause case now on the Court's docket because it concerns the Free Exercise rights of military personnel. Having granted certiorari in cases involving even indirect inhibitions on religious practices growing out of substantial governmental interests, this Court should also decide whether the military services may impose direct prohibitions on religious observances if their only justification is "enforcement of regulations, not for the sake of the regulations themselves, but for the sake of enforcement."

1. The decision of the court of appeals conflicts with this Court's consistent articulation of the constitutional standards for governmental restrictions on religiously motivated observances. The Court said in *Thomas* v. *Review Board*, 450 U.S. 707, 718 (1981):

> The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.

In *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972), this Court observed that it was "the essence of all that has been said and written" on the subject of the Free Exercise Clause

> that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

And in *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963), the Court rejected the proposition that a "showing merely of a rational relationship to some colorable state interest" justifies an infringement on a Free Exercise right. The Court said that "in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"

Although this Court has frequently noted that greater deference must be given by the judiciary to legislative judgments affecting military affairs than to laws affecting only civilian interests, that doctrine has not been applied to override fundamental constitutional rights. Indeed, in *Brown* v. *Glines*, 444 U.S. 348, 353-58 (1980), the Court sustained Air Force regulations that affected free expression only after concluding that the regulations "protect a substantial Government interest" (444 U.S. at 354), and that they "restrict speech no more than is reasonably necessary to protect the substantial governmental interest" (444 U.S. at 355). If the approach of the court below—*i.e.*, that enforcement "for the sake of enforcement" is constitutionally sufficient in the military context—were valid, it would have substantially simplified this Court's task in *Brown* v. *Glines*.

As recently as *Chappell* v. *Wallace*, 103 S.Ct. 2362, 2367 (1983), this Court, speaking unanimously through Chief Justice Burger, reaffirmed the observation of former Chief Justice Warren that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." See also *Anderson* v. *Laird*, 466 F.2d 283, 296 (D.C. Cir. 1972) ("manifest restraints on the free exercise of religion can be saved from unconstitutionality only if they were enacted to serve paramount and compelling state interests, and if there are no alternative means to achieving the government's goal"); *Crawford* v. *Cushman*, 531 F.2d 1114, 1120 (2d Cir. 1976) ("a succession of cases . . . has reiterated the proposition that the military is subject to the Bill of Rights and its constitutional implications").

The unreasoned prohibition of petitioner's innocuous religious observance—which had caused not the slightest disruption of performance or morale during the previous three-

and-one-half years—was a blatant deprivation of his most basic right. It was ironic, as Judge Starr noted in dissent below, that the military—the institution that has "valiantly defended" our citizens' individual liberties "in the two centuries of the Nation's history"—now seeks to override religious liberty merely to secure uniformity and compliance.

2. This Court has granted certiorari in a number of Religion Clause cases this Term to consider the rights of religious observers under the Constitution's protection for the free exercise of religion. *E.g., Jensen* v. *Quaring*, No. 83-1944; *Alamo Foundation* v. *Donovan*, No. 83-1935. In both these cases the effect on religious observance of the governmental regulation is only indirect. In *Jensen* v. *Quaring*, observance of a conscientious belief results in the denial of a driver's license, and in *Alamo Foundation* v. *Donovan* no religious observance is affected. In the present circumstances, petitioner (like any other serviceman similarly situated [4]) is directly denied the right to engage in a religious observance so long as he is in the military service. Moreover, in each of the cases now on the Court's docket, there is an articulable governmental interest in the requirement imposed by law—a photograph is a desirable means of identification on a driver's license and a standard minimum wage for personal services has obvious social benefits. In the present case, there is no rational basis for the Air Force's restriction other than enforcement "for the sake of enforcement."

By the same token, arguments based on the policies of the Free Exercise Clause have been made in other cases on the Court's docket. *See, e.g., Estate of Thornton* v. *Caldor, Inc.*, No. 83-1158; *Wallace* v. *Jaffree*, Nos. 83-812 and 83-929; *Aguillar* v. *Felton*, Nos. 84-237 and 84-238. The Free Exercise claim made in this case is substantially more compelling than the analogous claims presented in the cases now on the Court's docket.

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[4] Two similar cases involving Orthodox Jewish servicemen are presently in the courts. *Bitterman* v. *Secretary of Defense*, D.D.C. No. 83-1177, *appeal pending*, D.C. Cir. No. 82-01455; *Kirshenbaum* v. *Secretary of Defense*, D.D.C. No. 84-5268, *appeal pending*, D.C. Cir. No. 84-01302.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

NATHAN LEWIN
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
DAVID J. BUTLER
BROWNSTEIN ZEIDMAN & SCHOMER
1025 Connecticut Avenue, N.W.,
Suite 900
Washington, D.C. 20036
(202) 457-6500

Attorneys for Petitioner

Of Counsel:
DENNIS RAPPS
NATIONAL JEWISH COMMISSION
ON LAW AND PUBLIC AFFAIRS [5]
450 Seventh Avenue, Suite 2203
New York, NY 10001
(212) 563-0100

January 7, 1985

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[5] The National Jewish Commission on Law and Public Affairs ("COLPA") frequently appears *amicus curiae* in this Court on behalf of the organized Orthodox Jewish community in cases involving the rights of religious minorities. In this case, it has assisted petitioner's counsel in the lower courts, and has been authorized to advise the Court that the position stated herein is supported by the following national Jewish rabbinic, synagogal, educational and social service organizations which represent the broad spectrum of the Orthodox Jewish community in this country:

Agudath Israel of America
National Council of Young Israel
Rabbinical Alliance of America
Rabbinical Council of America
Torah Umesorah, The National Society for Hebrew Day Schools
Union of Orthodox Jewish Congregations of America
Union of Orthodox Rabbis of the United States and Canada

APPENDIX

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1723

S. SIMCHA GOLDMAN, PLAINTIFF-APPELLEE,

v.

SECRETARY OF DEFENSE, ET AL., DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil No. ~~82-1455~~ 81-01522)

Argued March 22, 1983

Decided May 8, 1984

Alfred R. Mollin, Attorney, Department of Justice, with whom *J. Paul McGrath*, Assistant Attorney General, *Stanley S. Harris*, United States Attorney (at the time the brief was filed), and *Anthony J. Steinmeyer*, Attorney, Department of Justice, were on the brief, for appellants.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Nathan Lewin with whom *David J. Butler* and *Robert A. Smith*, were on the brief, for appellee.

Before: MIKVA and EDWARDS, *Circuit Judges*, and SWYGERT, **Senior Circuit Judge* for the United States Court of Appeals for the Seventh Circuit.

Opinion for the Court filed by Senior Circuit Judge SWYGERT.

SWYGERT, Senior Circuit Judge. This is an appeal by the Secretary of Defense and the Secretary of the Air Force from the district court's order enjoining the enforcement of an Air Force dress code regulation that had been invoked to prohibit the plaintiff, an Orthodox Jewish captain, from wearing a yarmulke for religious reasons while in military uniform. Because we believe the Air Force raised sufficient reason for prohibiting deviations from its uniformly applied uniform requirements, we reverse.

I

S. Simcha Goldman, an ordained rabbi, is an Orthodox Jew who, in accordance with his Orthodox Jewish upbringing, has since childhood observed certain Jewish traditions and laws including keeping his head covered at all times. Between 1970 and 1972 he served as a chaplain in the United States Navy, where he wore a yarmulke as a head covering while in uniform without incident. In 1973 he was admitted into the Armed Forces Health Professions Scholarship Program, which provided assistance for graduate study in exchange for a later commitment to serve on active duty in the armed services. See 10 U.S.C. §§ 2120-2127 (1982). After completing a Ph.D. in clinical psychology in 1977 Goldman entered active service as a captain and was assigned

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1982).

to the Mental Health Clinic of the Air Force Regional Hospital at March Air Force Base, in Riverside, California. Between September 1, 1977, and May 8, 1981, he wore a yarmulke at all times while on duty at March. Neither before his joining the Air Force nor during his first three and one-half years in the service was he informed that wearing a head covering in addition to his uniform was problematic, although he did explain its religious significance to several co-workers and patients who inquired. Throughout his service he received consistently outstanding evaluations in each of ten specified areas from his superiors, including the category "Professional qualities (Attitude, dress, cooperation, bearing)." JA 258-67.

On May 8, 1981, Goldman was summoned by Colonel Joseph Gregory, then the Hospital Commander at March, and was told that wearing a yarmulke while in uniform violated Air Force Regulation ("AFR") 35-10. AFR 35-10 is a meticulously detailed compendium of rules governing the proper wear and combination of uniform items, classified by rank, sex, job function, season, climate, weather, occasion, country or location within a country, and other such classifications. AFR 35-10 § 1-6 generally requires that "Air Force members will wear the Air Force uniform while performing their military duties, except when authorized to wear civilian clothes on duty," and AFR 35-10 § 1-6(h)(2)(f) requires that "[h]eadgear will not be worn . . . [w]hile indoors except by armed security personnel in the performance of their duties." Colonel Gregory informed Goldman that wearing a yarmulke in addition to the Air Force uniform, or wearing even a uniform hat indoors, would violate these regulations, and orally ordered him to cease wearing the yarmulke indoors at all places on the base except the hospital, noting that disobedience could subject him to a court-martial. Goldman's request that he be allowed to keep his head covered as required by his

religious beliefs was denied. After the meeting Goldman sought legal and religious counsel, and continued to wear a yarmulke. On June 23, 1981, after negotiations by his counsel proved unsuccessful, he was summoned for another meeting with Colonel Gregory, and received a written order to cease wearing the yarmulke anywhere on the base. His request to report for duty in civilian clothing pending legal resolution of the issue was denied. The next day he received a Letter of Reprimand, and sought and received two days' emergency leave when formal processing of the reprimand began. Colonel Gregory also withdrew a recommendation that Goldman's application to extend the term of his active service be approved, and substituted a negative recommendation.

On July 2, 1981, Goldman filed this suit, challenging the regulation on first amendment grounds. The district court granted a temporary restraining order and a preliminary injunction against enforcement of AFR 35-10 pending a full hearing. At the hearing the Air Force argued that strict observance of its regulations, which are detailed and exacting as to the occasions and manner for wearing "headgear,"[1] was necessary to preserve

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[1] AFR 35-10 § 1-6(h) prescribes the following general rules:

> Wear of Headgear:
>
> (1) Air Force personnel in uniform will wear proper headgear when outdoors (including while operating bicycles, mopeds, or similar vehicles, unless safety headgear is worn). Designation of uniform combinations and accessories to be worn during special occasions is a function of local commanders. However, there are times when wear of the service cap for men and beret for women is most proper. For example, members should wear this headgear when greeting and escorting US and foreign dignitaries such as heads of state, ambassadors, attaches, and legislative members. Commanders have the authority

morale (lest other members not excused from observing the largely arbitrary rules be resentful) and to instill a reflexive sense of obedience essential for military order,

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to specify other occasions when wear of the service cap (men) and beret (women) is proper.

(2) Headgear will not be worn:

(a) When ordered to uncover.

(b) When wearing required safety gear.

(c) When prohibited by major commanders on their flightlines.

(d) During religious services not associated with a military ceremony (the chaplain conducting a military religious ceremony will give guidance for wearing headgear).

(e) By women in dress uniforms. EXCEPTION: Women will wear the service hat or beret with the semiformal uniform or if outergarments are worn over the informal uniform.

(f) While indoors except by armed security police in the performance of their duties.

(3) The wear of headgear is optional:

(a) While operating or riding in military or privately owned vehicles.

(b) When wearing utility or organizational uniforms in the work area, as directed by the installation commander. A listing of designated areas must be incorporated into local supplements to this directive.

(4) Appropriate safety headgear is required for motorized two-wheeled vehicles and encouraged for bicycles (paragraph 1-16).

Id. § 2-5(j) specifies the manner in which certain hats are to be worn as follows:

> [The] service hat is worn squarely on the head. [The] flight cap is worn slightly to the right, with vertical crease of cap at center of forehead in a straight line with nose and at point between 1½ inches above the eyebrows. The crown is not crushed.

Special uniform hats for security police are prescribed in *id.* § 4-3(c)(1):

pride, teamwork, and image. The district court, however, discounted these arguments because the Air Force presented no objective studies to verify the assertion that

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Beret. All security police personnel at group level or below, including instructors at the USAF Security Police Academy, Lackland AFB TX, wear the blue beret, AF Shade 1561, in the following manner:

(a) Headband (edge binding) will be positioned straight across the forehead, 1 inch above the eyebrows. The top of the beret will be draped over the right ear and the stiffener, the command emblem or officer grade insignia, is aligned above the left eye.

(b) Officers wear their metal grade insignia (regular size). They may remove the insignia when it is desirable to subdue the appearance of the wearer. (For example, personnel on deployment or in a local ground defense environment.)

(c) Airmen wear the metallic command emblem affixed to the stiffener on the beret parallel to the edge binding. The bottom of the emblem will be positioned ½ inch from the top of the edge binding. They may remove the command emblem when it is desirable to subdue the appearance of the wearer. (For example, personnel on deployment or in a local ground defense environment.)

(d) The ribbon at the back of the beret will be adjusted for comfort and tied in a knot. Ribbon ends will be cut off at the knot.

Male food service personnel's hats are regulated by *id.* § 4-14(a):

(6) Chef Cap. White, high crown, French Chef style, as authorized in TA 016 or a plain white paper, expendable, high crown, adjustable head size, French Chef style, may be locally purchased for wear. Shift leaders on duty will wear the chef cap; however, they will not wear it outside the duty area.

(7) Food Handler's Cap. White, adjustable head size, expendable as authorized in TA 016. Personnel below the position of shift leader will wear this cap while en-

exceptions for religious reasons would erode morale and obedience. It also credited the evidence presented by Goldman's expert, a military psychologist, who testified

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gaged in food preparation; however, they will not wear it outside the duty area.

. . . .

(10) Headgear:

(a) Flight cap is worn with the basic uniform. This cap may not be worn when the field jacket is worn.

(b) Utility cap is worn with the basic uniform. This cap may not be worn when either the raincoat, all-weather coat or lightweight blue jacket is worn.

(c) Organizational baseball cap, when authorized by installation commander, is worn with the basic uniform. This cap may not be worn when either the raincoat, all-weather coat, or lightweight blue jacket is worn.

Hats to be worn with "functional clothing" are regulated by *id.* § 4-13:

a. As directed by the installation commander, the wearing of headgear is optional in the work area. A listing of designated areas must be incorporated into local supplements to this regulation. Required safety headgear must be worn. When away from the work area, members must wear appropriate military headgear.

b. Airmen do not wear chevrons on their caps.

c. No metallic devices are worn on functional clothing except:

(1) Officers will wear grade insignia on their caps.

(2) Metal grade insignia may be worn on white uniforms (for example, food service, medical, and dental uniforms).

Hats to be worn by other specialized members of the Air Force are regulated by *id.* § 4-11:

a. Members assigned to special operations (commando) units may wear the campaign (bush) hat with the utility uniform.

[Continued]

that making exceptions to the regulations for worthwhile reasons actually improved morale by dissipating hostility over minor disputes and conveying a sense of humaneness, as the military had found when it excused black members who suffered from pseudofolliculitis barbae (ingrown facial hair) from shaving; and credited Goldman's evidence that his yarmulke was unobtrusive and did not interfere with his work as a clinical psychologist. The district court therefore permanently enjoined the Air Force from prohibiting Goldman to wear a yarmulke while in uniform and from punishing him for refusing to remove it. This appeal followed.

II

The first dispute we must address concerns the proper level of scrutiny with which we must examine the alleg-

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[1] [Continued]

b. Basic training instructors within Air Training Command (ATC) may wear a blue campaign hat with utility and service uniform combinations.

c. Pararescue members may wear the maroon beret with special beret device, and bloused trousers with combat boots, with all uniform combinations.

d. Combat control team members may wear the scarlet beret with special beret device, and bloused trousers with combat boots, with all uniform combinations.

e. Air Weather Service parachutists may wear the light navy beret with special beret device, and bloused trousers with combat boots, with all uniform combinations.

f. Tactical Air Control personnel may wear the black beret with camouflage fatigues.

g. Military training instructors assigned to the Defense Language Institute English Language Center (DLIELC) may wear the distinctive maroon campaign hat.

AFR 35-10 contains numerous other rules concerning types of hats and manner of wear *passim*.

edly unconstitutional regulation. Goldman argues that the regulation must be scrutinized strictly and may be upheld only if it is narrowly drawn and justified by a compelling interest, because it affects a fundamental right guaranteed by the free exercise of religion clause of the first amendment. See *Thomas v. Review Board*, 450 U.S. 707, 718-19 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 214, 215, 221 (1972);[2] *Sherbert v. Verner*, 374 U.S. 398, 403, 406-07 (1963);[3] see also *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973).[4] The Air Force argues that it should be upheld if it is rational, because military judgments are entitled to special deference. See *Chappell v. Wallace*, 103 S.Ct. 2362, 2365-66 (1983); *Brown v. Glines*, 444 U.S. 348, 354, 356-57 (1980); *Parker v. Levy*, 417 U.S. 733, 758 (1974);[5] *Orloff v.*

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[2] The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

406 U.S. at 215.

[3] We must . . . consider whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Thomas* v. *Collins*, 323 U.S. 516, 530.

374 U.S. at 406.

[4] It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.

[5] While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and the military mission requires a different application of those

Willoughby, 345 U.S. 83, 94 (1953).[6] The Supreme Court discussed a similar dispute concerning the appropriate level of scrutiny of a sex-based classification in the military context in *Rostker v. Goldberg*, 453 U.S. 57 (1981). It rejected suggestions that consideration of the weighty interests on each side be used to refine the test under which the classification should be judged (an approach followed by some courts in analogous areas, see, e.g., *Madyun v. Franzen*, 704 F.2d 954, 959-60 (7th Cir.) (judging prisoners' free exercise claims under an intermediate standard), *cert. denied*, 104 S.Ct. 493 (1983)), holding instead that

> [a]nnounced degrees of "deference" to legislative judgments, just as levels of "scrutiny" which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result. In this case the courts are called upon to decide whether Congress, acting under an explicit constitutional grant of authority, has by that action transgressed an explicit guarantee of individual rights which limits the authority so conferred. Simply labeling the legislative decision "military" on the one hand or "gender-based" on the other does not automatically guide a court to the correct constitutional result.

453 U.S. at 69-70. Under this approach we must simply judge whether the restrictions on Goldman's right to ex-

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protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be impermissible outside it.

[6] The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

ercise his religion were authorized and justified by the power of the military to regulate itself, giving due weight to each of the conflicting interests. See also *United States v. Robel*, 389 U.S. 258, 267 (1967) ("We have recognized that, while the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interests. . . . It is not our function to examine the validity of [a] congressional judgment [that one alternative to the statute in question would be inadequate]. . . . We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake."). This inquiry does not require a "balancing" of the individual and military interests on each side, but rather a determination whether legitimate military ends are sought to be achieved by means designed to accommodate the individual right to an appropriate degree.[7]

The standard of review articulated in *Rostker* is designed for evaluating asserted clashes between individual

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[7] See *United States v. Robel*, 389 U.S. at 268 n.20:

> We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more circumscribed. Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way "balanced" those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict.

rights and governmental powers, each specifically provided for by the Constitution. Thus far we have assumed that such rights and powers are involved in this case, but in fact each of the parties here argues that the other's interest is illusory. These preliminary arguments must be evaluated before we turn to the merits of the plaintiff's claim. First, the Air Force contends that Jewish law does not require the covering of the head during work, citing G. Appel, The Concise Code of Jewish Law 34 n.3 (1977), I. Klein, A Guide to Jewish Religious Practice 51-52 (1979), and Goldman's own admission that some Orthodox Jews who consider themselves devout do not feel obliged to cover their heads at all times. It concludes that no free exercise interest is at stake. There is no question, however, that Goldman's religious convictions are sincere, even if not shared by all who profess his faith. The Supreme Court has decisively held that definitive articulation of religious dogma or practice is beyond the competence of secular judicial bodies, and that practices based on religious conviction, even if not universally followed, are protected by the free exercise clause. *Thomas v. Review Board*, 450 U.S. at 715-16.[8] It is indisputable that covering his head is a protected part of Goldman's exercise of his religion.

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[8] Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Conversely, Goldman argues that the Air Force's interest in uniformity is only marginally related in this case to its military mission, because it was acknowledged that Goldman's wearing a yarmulke had no effect on the performance of his duties or on the general esprit de corps at the base. He concludes that because the application of the regulation to him served no military purpose, it was, in effect, not an exercise of the military powers provided for by the Constitution, and deserved little deference. Although we discuss the premise of this argument, that the regulation serves no weighty purpose as applied to Goldman, in greater detail below, it is sufficient to note here that the efficacy or inefficacy of measures allegedly designed to serve a military purpose and taken by those to whom judgment on military affairs is entrusted does not alter their status as military matters, entitled to whatever degree of deference that status entails. Contrast *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (extending no special deference to statutes providing benefits to members of the uniformed services that never purported to be a congressional judgment on a uniquely military matter). For these preliminary purposes, the content of the military decisions is of far less importance than their constitutional source.

The source of the power exercised by the Air Force in issuing its regulation is problematic, however, but for a different reason. *Rostker* emphasized that great deference is due to *Congress*'s decisions concerning the military, because "Congress is a coequal branch of government whose Members take the same oath [judges] do to uphold the Constitution of the United States," 453 U.S. at 64, because the scope of power specifically entrusted by the Constitution to Congress in military matters is broad, *id.* at 64-65, and because of the lack of judicial competence in this area, *id.* at 65-66. See also *Chappell v. Wallace*, 103 S.Ct. at 2366; *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975); *Gilligan v. Morgan*, 413 U.S.

1, 10 (1973). But cf. *Crawford v. Cushman*, 531 F.2d 1114, 1121 (2d Cir. 1976) (finding "no basis for a judicial deference to the military here which precludes review of appellant's substantive constitutional claims" that a Marine Corps regulation requiring the discharge of women Marines for pregnancy violated equal protection and due process). As the district court noted, however, JA 17, the actions challenged in this case are not those of Congress, but those of the military, which cannot so readily be assumed to have weighed the competing claims of individual rights and military necessity. See *United States v. Robel*, 389 U.S. at 276-77 (Brennan, J., concurring in result); *Greene v. McElroy*, 360 U.S. 474, 506-08 (1959); *Korematsu v. United States*, 323 U.S. 214, 244 (1944) (Jackson, J., dissenting). We might therefore be less ready to indulge a presumption that the Air Force regulations accommodate individual rights in a constitutionally acceptable manner, because some of the reasons for such deference are lacking. Nevertheless, the Court has held that decisions made by the military under a delegation from Congress are entitled to deference, because of the specialized nature of judgments concerning internal military governance. See *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 890-94 (1961). Even though the specific authorization for Air Force dress code regulations, Exec. Order No. 11,390 § 1(7) (Jan. 24, 1968), 33 Fed. Reg. 841 (1968), *reprinted in* 1968 U.S. Code Cong. & Ad. News 4682, 4683, was purportedly promulgated pursuant to a specific delegation from Congress that had just been repealed, 10 U.S.C. § 8611 (1964), *repealed by* Act of Jan. 2, 1968, Pub. L. No. 90-235, § 8(2), 81 Stat. 753, 764, AFR 35-10 is nevertheless entitled to all the deference due to exercises of validly delegated power, because the Secretary of the Air Force is generally authorized by 10 U.S.C. § 8012(f) (1982) to prescribe regulations necessary to carry out his duties. *Cf. Brown v. Glines*, 444 U.S. at 353-58 (upholding different Air Force regulations). We

conclude that this case does involve a clash between constitutionally guaranteed individual rights and constitutionally authorized military power, of the kind addressed in *Rostker v. Goldberg*, and we therefore turn to an examination of the parties' substantive arguments.

The Air Force contends that precise adherence to its uniform requirements is necessary to maintain teamwork, motivation, discipline, esprit de corps, and image, and that making exceptions for any reason would undermine these goals. Goldman argues first that these assertions are based only on past military practice and have not been tested or validated, and second that in any case it is evident that making an exception for him would have no deleterious effect, as shown by the outstanding performance record he compiled during the three and one-half years when his practice of wearing a yarmulke went unchallenged. We discuss the arguments concerning the general validity of the uniform requirements and the feasibility of making exceptions to the regulation in turn.

Because in *Rostker* the Supreme Court considered in detail the extensive congressional hearings and reports concerning probable military needs before upholding Congress's decision to exclude women from draft registration, 453 U.S. at 72-83, Goldman argues that similar verification of the assumptions underlying the Air Force's decision to enforce its dress code regulations against him is necessary before we may uphold that decision. In reaching its conclusion that exceptionless uniformity is beneficial, the Air Force relies on its own experience and on reports that laxity in enforcing such regulations had contributed to lapses in discipline in other branches of the armed services. See Report by the Special Subcommittee on Disciplinary Problems in the U.S. Navy of the House Committee on Armed Services, 92d Cong., 2d Sess. 17,682 (Comm. Serial No. 92-81, 1973); JA 60-66, 71-72; H. Semmes, Portrait of Patton 8

(1955) ("Insistence on strict compliance with uniform regulations breaks down the barrier of resentment to discipline, possibly more than anything else. If men strictly obey the regulations about wearing the uniform, they can be held truly disciplined men."). Its judgment was in the area of military governance, on which its expertise is high and on which judicial competence is low. *Rostker*, 353 U.S. at 70. Although we must not abdicate our responsibility to review the constitutional challenge, we cannot lightly substitute our judgment whether a closer accommodation of religious interests would be possible given the legitimate military interests in order and obedience. *Id.* at 70-71.

Our review of the more particularized arguments concerning the feasibility of making exceptions to the regulations does not persuade us that the Air Force's judgment must be set aside. One of its arguments, it is true, is unpersuasive. General Usher, who testified on behalf of the Air Force at trial, argued that one reason for scrupulous uniformity was safety, because, for example, an unauthorized hat worn on a flight line might fly into a jet engine and cause it to malfunction or explode. JA 63-64. We have no doubt that more narrowly drawn regulations, accommodating religious practices to a greater degree, would satisfy such safety concerns; there is no indication that safety within the Mental Health Clinic was threatened.

Goldman argues that his yarmulke, which was small, dark colored like his hair, and unobtrusive, posed as little danger to morale, appearance, and discipline as it did to safety. The Air Force responds that it is necessary to consider, not the effect of a single exception, but the cumulative effect of numerous exceptions that might be requested, in evaluating the disruptive effects of failure to enforce AFR 35-10. It cites *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 652-54 (1981), in which the Supreme Court upheld a state reg-

ulation of the time, place, and manner of solicitation on state fairgrounds because of the likely disruption if the plaintiffs and numerous others proselytized freely, and argues that if members of numerous other religions with distinctive garb flood the Air Force with requests for exemptions, similarly severe disruption would result. It offered a study of religious garb requirements, indicating that various sects require a wide variety of practices, including wearing turbans, robes, face and body paint, shorn hair, unshorn hair, badges, rings, amulets, bracelets, jodhpurs, and symbolic daggers, JA 274-84, to show that the danger of disruption was real. This argument assumes that substantial numbers of members of these sects have enlisted and would be likely to request exemptions, and that the Air Force could not distinguish practices that would not be obtrusive from those that would.

Goldman argues that no showing was made of the representation of these sects in the service, making it impossible to reach any conclusion about likely disruption. Although this argument has some force, the Air Force responds that the study was designed to survey the practices of religious adherents likely to be found in the armed services.

Goldman also argues that a less restrictive means of avoiding disruptive aberrations from the uniform requirements would be to bar only those practices that are actually obtrusive. If a yarmulke like Goldman's is in fact not obtrusive, as the district court found, even widespread adherence to the practice would not be chaotic, unlike *Heffron*, where widespread proselytizing would have posed very real crowd control problems. The Air Force responds that it cannot reasonably distinguish among various religious practices, but must either allow or disallow all requested exceptions. At first blush this response seems weak for two reasons. First, the Supreme Court has not hesitated in the past to assess whether ap-

plication of a state law to members of a religious group furthers the asserted state interest. In *Wisconsin v. Yoder*, 406 U.S. at 221-22, for example, it held that the state's legitimate interest in promoting self-reliance among its citizens was not furthered by applying its mandatory school attendance law to Amish children, who were adequately trained for a productive life within their own communities. Similarly, in *Thomas v. Review Board*, 450 U.S. at 718-19, the Court held that withholding unemployment benefits from a worker who resigned for religious reasons did not further the state's interest in preventing unemployment, because there was no evidence that it would be difficult to distinguish those who resign for personal reasons from those who resign for religious ones. See also *Sherbert v. Verner*, 374 U.S. at 407. Moreover, it appears that the Air Force already distinguishes among practices that may be religious, for the regulations permit certain deviations from complete visible uniformity, such as the wearing of rings and bracelets of nonuniform design, see AFR 35-10 § 1-12 (b) (1) (b), and have been interpreted to allow the wearing of nonuniform undergarments and ornaments, provided they are not visible beneath the required uniform, despite the existence of military-issue undergarments. The Air Force therefore does distinguish, for example, Mormons who wear "temple garments" underneath their outer clothing from Orthodox Jews, whose religious garb, though visible, is nearly as unobtrusive. If obtrusiveness is the underlying standard actually employed in making these distinctions, the Air Force arguably should be required to employ it in a more thoroughgoing manner, in order to accommodate rights of free exercise to the greatest possible extent. It then would be no answer to assert, as the Air Force does, that wearing rings and special undergarments are not exceptions to the uniform requirements, on the ground that the regulation specifically allows them, because the reason for the difference in treatment of various nonstandardized articles of cloth-

ing and ornaments, rather than the fact of the difference, would be at issue.

We are nevertheless persuaded that the peculiar nature of the Air Force's interest in uniformity renders the strict enforcement of its regulation permissible. That interest lies in the enforcement of regulations, not for the sake of the regulations themselves, but for the sake of enforcement. Its regulations are necessarily arbitrary. It is impossible to argue, for example, that a decorative hat of one shape or one color is demonstrably superior to another, although it is possible to argue that enforcement of rules that certain hats may be worn only by certain people or at certain times serves the military purposes of identification and indoctrination into instinctive obedience. Unlike the states in *Wisconsin v. Yoder*, *Thomas v. Review Board*, and *Sherbert v. Verner*, whose interests in enforcing their rules would not be greatly impaired by making exceptions when enforcement would not serve the purpose underlying the rules, the Air Force has no concrete interest separate from the effect of strict enforcement itself. The rules themselves are arbitrary, and are enforced up to an arbitrary cutoff point—the point of visibility. It is nearly inevitable that some religious practices will fall on one side of the line and some on the other. But the Air Force argues that it cannot make exceptions to the cutoff line for religious reasons without incurring resentment from those who are compelled to adhere to the rules strictly (and whose resentment would be intensified by the arbitrariness of the rules), thereby undermining the goals of teamwork, motivation, discipline, and the like; and that it cannot move the line, so as to avoid the problem of making exceptions, without losing the benefits of uniformity altogether. It therefore concludes that strict enforcement of its regulations is necessary for its military purposes. Although Goldman's expert testified that making exceptions would defuse rather than cause resentment, the Air Force's

judgment on this issue is entitled to deference because it is within its expertise and outside ours.

The free exercise clause of the first amendment guarantees both the freedom to believe and the freedom to act, but only the former is absolute; conduct is regulable for a permissible reason, provided that the regulation is not unduly restrictive. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). Although Goldman raises serious questions concerning the restrictiveness of the Air Force's regulations and the manner of their enforcement, the Air Force's reason for its rules, particularly in view of their specialized military nature, are sufficient answer. The judgment below is therefore vacated and the case remanded. On remand the district court should determine whether, in light of the difficulty of the issue and the good faith of the parties, equity requires that Goldman's military record be expunged of any negative materials related to the issues in this case.

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1723

S. SIMCHA GOLDMAN

v.

SECRETARY OF DEFENSE, et al., APPELLANTS

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 81-01522)

On Appellee's Suggestion for
Rehearing *En Banc*

Filed: August 10, 1984

Nathan Lewin and *David J. Butler* were on the suggestion for rehearing *en banc* filed by appellee.

Before: ROBINSON, *Chief Judge*; WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, *Circuit Judges*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

ORDER

Appellee's suggestion for rehearing *en banc* has been transmitted to the full court and a majority of the judges in regular active service have not voted in favor of such rehearing. Accordingly, it is

ORDERED, by the Court, *en banc*, that appellee's suggestion for rehearing *en banc* is denied.

Per Curiam

Statement dissenting from denial of suggestion to hear case *en banc* filed by *Circuit Judge* STARR.

Statement dissenting from denial of suggestion to hear case *en banc* filed by *Circuit Judge* GINSBURG, in which *Circuit Judge* SCALIA concurs.

STARR, *Circuit Judge, dissenting from denial of suggestion to hear case en banc.*

I respectfully dissent from the court's declination to hear this case en banc.

The tension between individual liberty guaranteed by the Bill of Rights and the demands of our armed services in carrying out their vital mission is an area fraught with extreme difficulty. But with respect I am constrained to conclude that, notwithstanding the sensitivity of the setting, the panel decision in this case does considerable violence to the bulwark of freedom guaranteed by the Free Exercise Clause.

It cannot be gainsaid that the judiciary is singularly ill-equipped to sit in judgment on military personnel regulations. In matters touching upon the exigencies of military affairs, the courts have wisely exercised the restraint and caution that befits the unelected branch of government. The wisdom of Justice Jackson in *Orloff v. Willoughby*, 345 U.S. 83 (1953), articulated in the shadow of the Korean Conflict, bears repeating today:

> The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate [military] matters as the [military] must be scrupulous not to intervene in judicial matters.

Id. at 94. And this court has rightly been quick to decline invitations to engage in "judicial oversight of military policy decisions. . . ." *Blevins v. Orr*, 721 F.2d 1419, 1423 (D.C. Cir. 1983).

It is thus with circumspection that I have come to the view that the panel decision abdicates the judiciary's limited but important function in the extraordinarily delicate environment of military personnel. For notwithstanding the broad latitude rightly vested in those

charged with defending the Nation's security, I am unable to agree that the needs of the military warrant vitiating the very liberties which the armed services have valiantly defended in the two centuries of the Nation's history.

To briefly review the facts giving rise to this case, it is undisputed that Dr. Goldman has served his country with distinction for fourteen years. It is also undisputed that during this period of exemplary service, Dr. Goldman followed uneventfully the dictates of his conscience by wearing the traditional yarmulke, a symbol of his faith whose roots are as deep and venerable as Western civilization itself. It is further undisputed that Dr. Goldman's wearing of the yarmulke resulted in no displacement of the military uniform in any manner whatever. Dr. Goldman never objected to wearing the entire military uniform as prescribed in the regulations. He simply chose, by reason of conscience, to wear in addition this symbol of a great faith from which Western morality and the Judaeo-Christian tradition have arisen. This is the offense for which Dr. Goldman has been threatened with court-martial.

The military itself, at least until today, has assiduously and quite properly defended the right of the Nation's military personnel to engage in worship and other religious observances while on active duty and while on military bases. The military thus stands before the court with a long and admirable tradition of providing, at taxpayers' expense, chaplaincies and places of worship on military bases around the world. In the context of this tradition, it would be unthinkable for the military to promulgate a rule that forbade audible prayer while a serviceman is on active duty. Yet the military seeks to forbid an act that partakes of the religious significance of prayer and is equally unobtrusive. And, critically, the applicable military regulations permit the wearing of other unobtrusive religious regalia, such as undergar-

ments or rings and bracelets bearing religious significance. Dr. Goldman's only "error" is that he wears a yarmulke.

The treatment of Dr. Goldman seems to me patently unconscionable. While courts quite properly defer to military expertise, we cannot abdicate our core constitutional responsibilities simply because a case arises in a military setting. As Justice Jackson also stated:

> [W]e act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in . . . specialties . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943). Chief Justice Marshall made the point even more succinctly: "That this court dares not usurp power is most true. That this court dares not shrink from its duty is no less true." 2 Burr's Trial at 444.

The panel opinion justifies this manifest infringement of First Amendment liberty by the military's need for uniform adherence to an *admittedly arbitrary* rule. In the military's view, accepted by the panel, providing exceptions to the rule would cause resentment in those servicemen for whose religious garb no exception can properly be made. The military's claim that flexibility generates resentment, whereas arbitrariness keeps the corps content, is utterly belied, however, by Dr. Goldman's own experience in serving his country. Not a scintilla of evidence in the record suggests that his wearing of a yarmulke caused any resentment whatever in others. The claim is contradicted by expert testimony, credited by the trial court, that making exceptions to accommodate deeply held religious beliefs would defuse rather than cause resentment. The claim is also at odds with common sense. Reasonable servicemen would more

justly be annoyed with the mechanical enforcement of arbitrary rules that prevent the wearing of such unobtrusive symbols of religious faith while allowing others to wear religious rings and bracelets. The vice inherent in an arbitrary rule of this kind is that it does not offer to one who falls on the wrong side of the line any reason for the disparate treatment from which he or she suffers.

In interpreting the Free Exercise Clause, the Supreme Court has required those in authority to accommodate those who wish to exercise their religious liberties, unless the accommodation would prove unduly burdensome. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1971). Slavish devotion to arbitrary rules is precisely the opposite of the spirit of accommodation which the Constitution, as interpreted by the Supreme Court, requires. Unless the military can offer firmer support for the counterintuitive proposition that accommodation of its dress code to deeply held religious beliefs breeds more resentment than simple arbitrariness, it should not be allowed to abrogate this long-standing interpretation of the Free Exercise Clause.

It is time to recall that the First Amendment means more than a strong and free press. It means more than protecting the right peaceably to assemble. It means more than preventing the National Government from establishing a state religion. It means the inalienable right of all our people as free men and women to worship God. That is what this country is all about. Dr. Goldman has been required to render to Caesar far too much for far too little reason.

GINSBURG, *Circuit Judge, dissenting from denial of suggestion to hear case en banc*, in which Judge Scalia concurs: The plaintiff in this case, S. Simcha Goldman, has long served his country as an Air Force officer with honor and devotion. A military commander has now declared intolerable the yarmulke Dr. Goldman has worn without incident throughout his several years of military service. At the least, the declaration suggests "callous indifference" to Dr. Goldman's religious faith, and it runs counter to "the best of our traditions" to "accommodate[] the public service to the[] spiritual needs [of our people]." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *cf. Braunfeld v. Braun*, 366 U.S. 599, 616 (1961) (Stewart, J., dissenting) (commenting on state law exposing Orthodox Jew to "cruel choice" between "his religious faith and his economic survival"). For the reasons indicated in Judge Starr's eloquent statement, I believe the court en banc should measure the command suddenly and lately championed by the military against the restraint imposed even on an armed forces commander by the Free Exercise Clause of the First Amendment.

APPENDIX C

[FILED APR 26 1982, JAMES F. DAVEY, Clerk]

United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action 81-3197

S. SIMCHA GOLDMAN,

Plaintiff

v.

SECRETARY OF DEFENSE, *et al.*,

Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1.) Plaintiff S. Simcha Goldman ("Goldman") is a member of the Orthodox Jewish faith, an ordained Rabbi, and until August 30, 1981, a Captain in the United States Air Force serving at March Air Force Base, Riverside, California. Prior to his Air Force service he had been a chaplain in the Navy.

2.) Defendants are the Secretary of Defense and the Secretary of the Air Force. This action is brought against them in their official capacities.

3.) Since his assignment to the Mental Health Clinic at March Air Force Base Regional Hospital in September 1977, including while he was in military uniform, and pursuant to tradition and practice of his Orthodox Jewish faith, Goldman has worn a small head covering ("yarmulke"). Goldman has continuously worn his yarmulke since he was a child.

4.) From September 1977 to May 7, 1981, no objection was raised to Goldman's wearing of his yarmulke while in uniform. On May 8, 1981, Colonel Joseph Gregory, the Hospital Commander at March Air Force Base, informed

Goldman that the wearing of a yarmulke while in military uniform violated Air Force Dress Code Regulations ("AFR") 35-10.[1] Colonel Gregory ordered Goldman to cease wearing a yarmulke indoors while in uniform at all places at March Air Force Base except while working at the Regional Hospital.

5.) Goldman informed Colonel Gregory that the wearing of the yarmulke was required by his Orthodox Jewish religious beliefs and practices and was a religious observance he believed protected by the First Amendment to the United States Constitution. Goldman requested permission to continue wearing a yarmulke at all times and at all places while in uniform, despite the provisions of AFR 35-10. His request was denied.

6.) On June 23, 1981, Goldman was ordered by Colonel Gregory to cease wearing his yarmulke anywhere while in uniform at March Air Force Base, including the Regional Hospital. Goldman's request to appear for duty in civilian clothes until the dispute was resolved was denied.

7.) On June 24, 1981, Colonel Gregory issued a letter of reprimand to Goldman because he refused to remove his yarmulke in violation of the June 23 order of Gregory. Goldman was notified on June 30 of the formal processing of the letter of reprimand. He immediately requested and was granted two (2) days of emergency leave.

8.) On July 2, 1981, Goldman filed this action. His application for a Temporary Restraining Order was granted. On July 10, 1981, this Court issued a preliminary injunction enjoining defendants from enforcing AFR 35-10 to prohibit Goldman from wearing a yarmulke while in uniform during the pendency of this action.

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[1] AFR 35-10 provides:

> "... Air Force members will wear the Air Force Uniform while performing their military duties ... members will wear only the uniform items as prescribed by this regulation ... the wearing of combinations of uniform items not specifically prescribed in this regulation is prohibited ..."

It was promulgated pursuant to Executive Order 11390 § 1(7) (1968) and 10 U.S.C. § 8611, now repealed. Enforcement of the regulation is an exercise of the duties of the Secretary of the Air Force, as delegated by Congress in 10 U.S.C. § 8012 (1976).

9.) Trial was held on September 10, 1981. Major General William P. Usher, United States Air Force, Director of Personnel Plans at Air Force Headquarters, testified for Defendants as an expert on the bases underlying and the need for the uniform requirements of AFR 35-10. General Usher described the mission of the Air Force as being an instrument of National Security with a responsibility in conjunction with other military services, for defending this country against its enemies. He enumerated five major prerequisites for an effective and efficient fighting force: 1) teamwork; 2) motivation; 3) discipline; 4) esprit de corps; and 5) image. His testimony may be summarized as follows:

> Teamwork is the cutting edge of a combat ready fighting force; it is the welding of a well-oiled machine of people. A high degree of teamwork must be practiced to provide a combat ready fighting force. Uniformity of dress, except for distinctions of rank, promotes the teamwork necessary for effective completion of the mission.
>
> Motivation provides the energy, the willingness to do what is "above and beyond," that often is the key to success in combat.
>
> Discipline helps insure that teamwork does not breakdown and assures a truly obedient response from the team. It is essential to prevent combat ineffectiveness and to minimize endangering lives. Uniform dress and appearance requirements are critical to maintaining the discipline necessary for an effective fighting force. Discipline of enlisted personnel would be undermined if a departure is permitted by an officer.
>
> Esprit de corps makes for a more effective fighting unit and comes when members of the unit are proud of their organization and are willing to subordinate their personal interests to the mission of the Air Force. Uniform standards of dress engender pride and thus further the mission of the Air Force. Departures from the uniformity requirements tend to

counteract pride and motivation and detract from the single image necessary for esprit de corps.

Image plays an important role in recruiting top flight people, in retaining experienced personnel, in sustaining the Air Force as an effective fighting force and in gaining public support.

10.) It is the official position of the United States Air Force that the requirements of AFR 35-10 pertaining to the wearing of the Air Force uniform are part of the method for providing teamwork, motivation, discipline, esprit de corps and image in the United States Air Force. Departure from the uniformity standards of AFR 35-10, in the opinion of the Air Force, would adversely affect the promotion of teamwork, counteract pride and motivation, undermine discipline and morale.

This position was not established by clinical or other studies of the effect on a combat-ready fighting force unit of exceptions from the uniformity requirements of AFR 35-10. It is based upon the experience of the Air Force in times of peace and in times of war.

11.) AFR 35-10 includes a religious exception that permits the chaplain in charge of a particular religious service to specify particular headgear to be worn by members who are participating in that service. There are no other religious exceptions to the regulations except that Air Force chaplains on inactive reserve status may wear beards for religious reasons.

12.) Exceptions for legitimate reasons from the requirements of AFR 35-10 may enhance the effectiveness of the Air Force by dissipating hostility over minor matters and thus contribute to a perception of the Air Force as a less rigid, more humane institution. Occasional exceptions to the requirements of AFR 35-10 for specific legitimate purposes will not adversely affect the ability of the Air Force to carry out its mission.

13.) In enforcing AFR 35-10, the Air Force does not distinguish between personnel deviating from uniform dress for religious reasons and those deviating from uniform dress for other reasons such as personal taste or preference. All, like Goldman, are subject to court-martial or other sanctions for violations of the uniform dress requirements of AFR 35-10.

14.) During his service at March Air Force Base, Goldman's wearing of a yarmulke while in military uniform did not adversely affect the performance of his assigned duties nor the operations at the Base Regional Hospital and did not result in complaints from other personnel. Goldman's performance evaluations were consistently at the higher levels. His application for the renewal of his Air Force contract was endorsed with a commendation for his work in the Mental Health Clinic.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1361.

2. Venue in this district is proper under 28 U.S.C. § 1391(b).

3. The wearing of a yarmulke by a Jewish male is a practice which falls within the ambit of the free exercise clause of the First Amendment to the United States Constitution. *See Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940).

4. It is well established that "[w]hile members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." *Parker v. Levy,* 417 U.S. 733, 758. "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Id.*

5. When regulation of the military is faced with a constitutional challenge, "the courts are called upon to decide whether Congress [or its delegate], acting under an explicit constitutional grant of authority, has by that action transgressed an explicit guarantee of individual rights which limits the authority so conferred." *Rostker v. Goldberg,* 101 S. Ct. 2646, 2654 (1981). In determining whether an explicit guarantee of individual rights has been transgressed, attention must be focused on whether or not the decision occasioning the constitutional challenge was the result of a studied and supported

analysis or one based on instinct, assumptions and individual experience; "deference does not mean abdication." *Id.*

6. The decision to exclude a *bona fide* religious exception for the wearing of yarmulkes from AFR 35-10 was not the result of a studied and supported analysis. The only evidence adduced at trial through General Usher was that tradition and personal experience has taught that discipline, esprit de corps, motivation, teamwork and image would be injured by allowing a religious exception for the wearing of yarmulkes.

7. By contrast, in *Rostker,* the Court was persuaded that the decision to exclude women from the draft did not violate the constitution upon examination of the careful consideration Congress gave to the question of an all male draft. Justice Rehnquist wrote that "[t]he District Court was quite wrong in undertaking an independent evaluation of this evidence [studied by Congress], rather than adopting an appropriately deferential examination of Congress' evaluation of that evidence." In short, deference can only be given to the decision maker regulating the military when its decision was a reasoned and deliberate one. Had the decision to exclude a *bona fide* religious exception for yarmulkes from AFR 35-10 been the product of an empirical study, psychological survey or the like, it would be supportable. While respect must be given General Usher's expertise, his conclusions, based as they are on the personal beliefs and assumptions of Air Force officials, are inadequate to withstand constitutional scrutiny.

8. Members of the Jewish faith have no special claim to first amendment protection on account of their religion and its dictates. *See Heffron v. Int'l Soc'y for Krishna Consciousness,* 101 S. Ct. 2559 (1981). Once an exception is made for male members of the Jewish faith to wear yarmulkes, members of other faiths who wish to wear skull caps must be permitted to do so.

9. Under the *Rostker* analysis, there was no evidence presented at trial sufficient to conclude that the military prohibition of yarmulkes in the interest of discipline overrides individuals' interests in exercising their freedom of religion.

10. Colonel Gregory's order of June 23, 1981, and the absence of a *bona fide* religious exception from AFR 35-10 for the wearing of yarmulkes while in uniform violated Plaintiff's First Amendment guarantee to the free exercise of religion.

An appropriate Order accompanies these Findings of Fact and Conclusions of Law.

Aubrey E. Robinson, Jr.
United States District Judge

DATE: April , 1982

[FILED APR 26 1982, JAMES F. DAVEY, Clerk]

United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1522

S. SIMCHA GOLDMAN,

Plaintiff,

v.

SECRETARY OF DEFENSE, *et al.*,

Defendants.

ORDER

Upon consideration of the Findings of Fact and Conclusions of Law entered this date, and of the entire record herein, it is by the Court this 26th day of April, 1982,

DECLARED, that the order issued to Plaintiff to cease wearing his yarmulke while in uniform, and its enforcement, violated the First Amendment to the United States Constitution; and it is

ORDERED, that defendants, their agents, subordinates or anyone acting in concert with them be and hereby are ENJOINED from applying AFR 35-10 to Plaintiff insofar as it relates to his wearing a yarmulke for religious reasons; and it is

FURTHER ORDERED, that defendants, their agents, subordinates or anyone acting in concert with them shall expunge from Plaintiff's military records all references to disciplinary action, sanctions or penalties (including negative recommendations concerning Plaintiff's continued military service) resulting directly or indirectly from Plaintiff's insistence upon wearing a yarmulke, despite the provisions of AFR 35-10; and it is

FURTHER ORDERED, that Defendants shall pay Plaintiff money damages equivalent to two days' pay for someone of Plaintiff's rank on June, 1981, to compensate Plaintiff for the two days emergency leave taken to avoid the imposition of immediate sanctions before this action was filed.

Aubrey E. Robinson, Jr.
United States District Judge

APPENDIX D

Supreme Court of the United States

No. A-339

S. SIMCHA GOLDMAN,

Petitioner,

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 10, 1984

/s/ WARREN E. BURGER

Chief Justice of the United States.

Dated this 1st day of November, 1984

APPENDIX E

Supreme Court of the United States

No. A-339

S. SIMCHA GOLDMAN,

Petitioner,

v.

CASPER W. WEINBERGER, SECRETARY OF DEFENSE, *et al.*

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including January 7, 1985.

/s/ WARREN E. BURGER

Chief Justice of the United States

Dated this 3rd day of December, 1984.

Office-Supreme Court, U.S.
FILED
MAR 25 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1097

In the Supreme Court of the United States

OCTOBER TERM, 1984

S. SIMCHA GOLDMAN, PETITIONER

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

19pp

QUESTION PRESENTED

Whether the Free Exercise Clause of the First Amendment requires the Air Force to create an exception to otherwise applicable uniform regulations so that an Orthodox Jewish officer may wear a skullcap (or yarmulke) while on active duty.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1097

S. SIMCHA GOLDMAN, PETITIONER

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 734 F.2d 1531. The opinions on denial of rehearing en banc (Pet. App. 23a-27a) are reported at 739 F.2d 657. The opinion of the district court (Pet. App. 28a-34a) is unreported. The opinion of the district court on preliminary injunction is reported at 530 F. Supp. 12.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1984, and a petition for rehearing was denied on August 10, 1984 (Pet. App. 21a-27a). On November 1, 1984, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 10, 1984. On December 3, 1984, the Chief Justice again extended the time, to and including January 7, 1985, and the petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner S. Simcha Goldman, formerly a captain in the United States Air Force, is a member of the Orthodox Jewish faith and an ordained rabbi. In keeping with the practice and tradition of his religion, petitioner wears a head covering, usually a skullcap (or yarmulke), during waking hours. During the period at issue here, petitioner was on active duty at March Air Force Base in Riverside, California, serving as a clinical psychologist. Air Force Regulation 35-10, which prescribes the official Air Force uniform, provides that "Air Force members will wear the Air Force Uniform while performing their military duties" and that (with exceptions for armed security police and persons participating in certain religious services) "[h]eadgear will not be worn * * * [w]hile indoors" (A.F.R. 35-10, § 1-6; Pet. App. 4a-8a).

For several years, petitioner wore his yarmulke while on duty indoors, notwithstanding the uniform regulations, and no objection was raised by his superiors (Pet. App. 28a). In May 1981, however, petitioner's commander was informed of his uniform violation, and he was ordered to cease wearing the yarmulke with his uniform at all places on the Air Force Base outside the hospital where he worked (*id.* at 29a). Petitioner objected to this requirement, and requested permission to wear a yarmulke at all times and at all places while in uniform. On June 23, 1981, the hospital commander ordered petitioner to cease wearing his yarmulke anywhere while in uniform on the Base, including the hospital. When petitioner continued to wear his yarmulke, the commander issued him a letter of reprimand. *Ibid.* The commander also withdrew a recommendation that petitioner's application to extend the term of his active service be approved, and substituted a negative recommendation (Pet. App. 4a). Petitioner later voluntarily withdrew his

application to extend the term of his active service, and he is now on inactive reserve.[1]

2. Petitioner filed suit in the United States District Court for the District of Columbia, challenging this application of AFR 35-10 on First Amendment grounds and seeking damages and injunctive relief. The district court granted petitioner's motion for a temporary restraining order and later for a preliminary injunction to prohibit the Air Force from enforcing AFR 35-10 to prevent him from wearing a yarmulke while in uniform during the pendency of this litigation.

After trial, the district court found that making religious exceptions to the uniform regulations "may enhance the effectiveness of the Air Force by dissipating hostility over minor matters and thus contribute to a perception of the Air Force as a less rigid, more humane institution" (Pet. App. 31a). The court rejected the Air Force's position that uniform apparel regulations are necessary for providing "teamwork, motivation, discipline, esprit de corps and image" because "[t]his position was not established by clinical or other studies of the effect on a combat-ready fighting force" (*ibid.*).[2] The court held that enforcement of A.F.R. 35-10 in these circumstances violated petitioner's right to the free exercise of religion (Pet. App. 34a) and enjoined respondents from applying the regulation to petitioner "insofar as it relates to his wearing a yarmulke for religious reasons" (*id.* at 35a).

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[1]In a separate lawsuit, petitioner is challenging the denial of his application for active duty reserve status. That denial is not at issue here.

[2]The district court stated (Pet. App. 33a) that "[h]ad the decision to exclude a *bona fide* religious exception for yarmulkes from A.F.R. 35-10 been the product of an empirical study, psychological survey, or the like, it would be supportable."

The court of appeals vacated and remanded (Pet. App. 1a-20a). The court concluded (*id.* at 12a) that petitioner had a legitimate free exercise interest in wearing a yarmulke with his uniform but that the Air Force's rationale that "strict enforcement of its regulations is necessary for military purposes" is "entitled to deference because it is within its expertise and outside ours" (*id.* at 19a-20a). After reviewing applicable precedents of this Court, the court of appeals held (*id.* at 11a) that its function was not to undertake a " 'balancing' of the individual and military interests on each side," but to determine "whether legitimate military ends are sought to be achieved by means designed to accommodate the individual right to an appropriate degree." Although petitioner "raises serious questions concerning the restrictiveness of the Air Force's regulations and the manner of their enforcement," the court concluded that "the Air Force's reason for its rules, particularly in view of their specialized military nature, are sufficient answer" (*id.* at 20a).[3]

ARGUMENT

1. In *Kelley* v. *Johnson*, 425 U.S. 238 (1976), this Court recognized the strength of the governmental interest in enforcing uniform dress and grooming regulations in the police force. One of those interests was to promote "the esprit de corps which such similarity [in appearance] is felt to inculcate within the police force itself" (*id.* at 248). These considerations are no less powerful in the military.[4]

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[3]The court of appeals remanded the case to the district court for a determination whether, "in light of the difficulty of the issue and the good faith of the parties, equity requires that [petitioner's] military record be expunged of any negative materials related to the issues in this case" (Pet. App. 20a).

[4]Indeed, the argument in *Kelley* presupposed that uniform regulations would be valid in the military context; the lower court's reasoning in striking down the police regulation was that the " 'unique judicial deference' accorded by the judiciary to regulation of members of the military was inapplicable" to the police (425 U.S. at 246).

Uniform requirements of military dress and appearance have long been considered a key instrument in the welding of disparate individuals into a united and disciplined fighting team. Major General William P. Usher, the Director of Personnel Plans at Air Force Headquarters, testified in district court (Pet. App. 30a) that "[u]niformity of dress, except for distinctions of rank, promotes the teamwork necessary for effective completion of the mission," that "[d]iscipline of enlisted personnel would be undermined" if departures from uniform regulations were permitted, and that "[u]niform standards of dress engender pride and thus further the mission of the Air Force." As this case illustrates, however, uniformity of dress also entails restriction of individual choice, whether stemming from religious, ethnic, or cultural traditions or simply from personal taste.

One need not be unsympathetic to petitioner's situation to appreciate the difficulty of the problem facing the military. Many religious adherents may raise claims to exceptions from uniform regulations;[5] the military is in no position to make judgments regarding the relative strength or sincerity of these claims; the greater the number of exceptions to the uniform regulations, the less effective the regulations will be in achieving their ends of unity, morale, and discipline; the enforcement of uniform regulations is necessarily highly decentralized and requires simple, bright-line rules; the existence of grounds on which to challenge uniform requirements will necessarily foster challenges to authority; to permit some exceptions (on religious grounds) may undermine the willingness to conform of others who object to uniform requirements for other reasons (*e.g.*, free speech or ethnic tradition). The Air Force has adopted, for

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[5]Evidence at trial showed that for many religions, a variety of different garments, body markings, or hair styles have religious significance (C.A. App. 272-284).

the present, a simple, neutral solution: it permits no visible deviations from the uniform regulations for active duty personnel. We submit that, in the military context, this solution is constitutionally acceptable.

Not even the district court found that petitioner has a substantive right to a religious exception to the uniform regulations, which may not be infringed by the Air Force. Rather, the basis for the district court's judgment in favor of peititioner was that the Air Force uniform regulations are insufficiently supported by "clinical or other studies" (Pet. App. 31a). The court expressly stated that "[h]ad the decision to exclude a *bona fide* religious exception for yarmulkes * * * been the product of an empirical study, psychological survey or the like, it would be supportable" (*id.* at 33a). On this basis, the district court enjoined the Air Force from applying that regulation to petitioner "insofar as it relates to his wearing a yarmulke for religious reasons" (*id.* at 35a). This holding is in error for two fundamental reasons.

First, the military is not required to conduct clinical studies before it may enforce regulations of this sort. The district court observed that the regulations are "based upon the experience of the Air Force in times of peace and in times of war" (Pet. App. 31a) and that "respect" must be given General Usher's testimony explaining the military reasons for the regulations (*id.* at 33a). The court held, however, that conclusions "based * * * on the personal beliefs and assumptions of Air Force officials" — even those with "expertise" in the area — "are inadequate to withstand constitutional scrutiny" (*ibid.*).

This analysis is wholly unprecedented. It is not the role of the courts to second-guess decisions of an admittedly military character merely because they are based on practical "experience" rather than "empirical stud[ies]." " 'The

complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments.' " *Chappell* v. *Wallace,* No. 82-167 (June 13, 1983), slip op. 6, quoting *Gilligan* v. *Morgan,* 413 U.S. 1, 10 (1973). Cf. *Parker* v. *Levy,* 417 U.S. 733, 763 (1974) (Blackmun, J., concurring) ("The subtle airs that govern the command relationship are not always capable of specification."). As the court of appeals observed, "the Air Force's judgment on this issue is entitled to deference because it is within its expertise and outside ours" (Pet. App. 19a-20a).

Second, the district court's decision was made in a vacuum, in the context of a single sympathetic case. The Air Force, in contrast, has an obligation to establish and enforce rules on a consistent and nonarbitrary basis. It cannot, without adequate rationale, permit airmen of one religious persuasion to disregard uniform regulations while requiring airmen of other faiths to obey. As discussed more fully below, at congressional direction the Department of Defense is undertaking a coordinated study to make recommendations about how the military might better accommodate religious practices. To make exceptions on a case-by-case basis both disregards the legitimate interest of the military in uniformity and results in disparate treatment among servicemen of different creeds.

This point is addressed most directly in *United States* v. *Lee,* 455 U.S. 252, 259-260 (1982). There, a member of a small religious group — the Old Order Amish — sought an exemption from the social security tax on employers on free exercise grounds. This Court recognized that such a claim cannot be analyzed on the basis of the particular claimant, or his religious group, alone. Rather, the question is whether the government's interest could be upheld in the face of "myriad exceptions flowing from a wide variety of religious beliefs" (*id.* at 260). Similarly, the feasibility of an

exemption from military dress and grooming regulations must be judged in light of the "myriad exceptions" to those regulations that would be sought. The district court made no attempt to show how its yarmulke exception would fit into the overall scheme of military dress and grooming.

The court of appeals' reversal of the district court decision is simply an application of established constitutional doctrine to the difficult facts of this case. The court held that the proper standard is "whether legitimate military ends are sought to be achieved by means designed to accommodate the individual right to an appropriate degree" (Pet. App. 11a, relying on *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), and *United States* v. *Robel*, 389 U.S. 258 (1967)). The court then analyzed the Air Force's rationale for its uniform regulation in considerable detail (Pet. App. 16a-20a), and concluded that "the peculiar nature of the Air Force's interest in uniformity renders the strict enforcement of its regulation permissible" (*id.* at 19a).

Petitioner apparently does not disagree with the legal standard applied by the court of appeals and quoted above. Instead, he challenges, as a factual matter, the strength of the justification for the Air Force rule. Petitioner contends that the action of the Air Force was an "unreasoned prohibition" (Pet. 6), that petitioner's disobedience to the regulations "had caused not the slightest disruption of performance or morale during the previous three-and-one-half years" (*id.* at 6-7), and that "there is no rational basis for the Air Force's restriction other than enforcement 'for the sake of enforcement' " (*id.* at 7). This disagreement with the court of appeals over the importance of the the Air Force regulations raises no significant question of law warranting review by this Court. Moreover, petitioner's assertions simply ignore the court of appeals' careful conclusions regarding the connection between uniform regulations and

morale and discipline.[6] Petitioner's argument is precisely the same as that rejected by this Court in the police context in *Kelley* v. *Johnson*, 425 U.S. at 243 (police grooming regulations said to have no purpose other than " '[u]niformity for uniformity's sake' "); the argument is no more meritorious here than it was in *Kelley*.

2. Petitioner does not contend that the decision below conflicts with any decision of this Court or of another court of appeals. Rather, petitioner asserts (Pet. 5) that the court of appeals' ruling conflicts with "this Court's consistent articulation of the constitutional standards for governmental restrictions on religiously motivated observances," citing *Thomas* v. *Review Board*, 450 U.S. 707 (1981), *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and *Sherbert* v. *Verner*, 374 U.S. 398 (1963). However, those decisions are readily distinguishable.

First, in none of those decisions was there a significant governmental interest in uniformity of application. Cf. *United States* v. *Lee*, 455 U.S. at 258-259 ("the Government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high"); *Braunfeld* v. *Brown*, 366 U.S. 599, 608-609

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[6]Petitioner relies heavily (Pet. 4, 5, 6, 7) on the court of appeals' statements that the Air Force regulations are "necessarily arbitrary" and that the Air Force's interest "lies in the enforcement of regulations * * * for the sake of enforcement" (Pet. App. 19a). However, these statements have been repeated out of their context. The court of appeals did not view the Air Force uniform regulations as "arbitrary" in the sense of having no reason or purpose. Rather, the court observed that the regulations are "arbitrary" in the sense that "[i]t is impossible to argue * * * that a decorative hat of one shape or one color is demonstrably superior to another" (*ibid.*). Nonetheless, as the court recognized and petitioner does not, "enforcement of rules that certain hats may be worn only by certain people or at certain times serves the military purposes of identification and indoctrination into instinctive obedience" (*ibid.*).

(1961) (rejecting claim for religious exemption from state law setting aside a uniform day of rest). As the court of appeals recognized (Pet. App. 19a), the interests of the states in *Yoder, Thomas,* and *Sherbert* in enforcing their rules "would not be greatly impaired by making exceptions when enforcement would not serve the purpose underlying the rules." By contrast, military uniforms must — as their name suggests — be uniform; nonuniformity would defeat the very purpose.

Second, the decisions relied upon by petitioner do not involve the military.[7] This Court has long recognized that "the different character of the military community and the military mission requires a different application of [First Amendment] protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be impermissible outside it." *Parker* v. *Levy,* 417 U.S. 733, 758 (1974). See also *Brown* v. *Glines,* 444 U.S. 348 (1980); *Middendorf* v. *Henry,* 425 U.S. 25 (1976); *Greer* v. *Spock,* 424 U.S. 828 (1976); *Orloff* v. *Willoughby,* 345 U.S. 83, 93-94 (1953); *Katcoff* v. *Marsh,* No. 84-6184 (2d Cir. Jan. 22, 1985), slip op. 1468-1469.

A uniform dress regulation of this sort would presumably not survive constitutional scrutiny outside the military, police, or analogous contexts, and would be subject to challenge in the private sector under Title VII of the Civil Rights Act of 1964. See 42 U.S.C. 2000e(j), 2(a)(1). In the military, however, the right to select one's manner of dress, like the right to circulate petitions or to engage in disruptive

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[7] *Brown* v. *Glines,* 444 U.S. 348 (1980), and *Chappell* v. *Wallace, supra,* also cited by petitioner (Pet. 6), obviously create no conflict with the decision below; in both cases this Court rejected constitutional challenges to military decisions.

expression, is circumscribed by the legitimate requirements of military discipline and order. "The rights of military men must yield somewhat 'to meet certain overriding demands of discipline and duty.' " *Brown* v. *Glines,* 444 U.S. at 354, quoting *Parker* v. *Levy,* 417 U.S. at 744 (citation omitted). Petitioner's argument simply fails to take into consideration the inherent distinctions between civilian and military life.

3. Aside from the legal merits, there are additional reasons why review of the decision below is unwarranted. First, although this case is not technically moot,[8] a reversal of the decision below would have no immediate practical effect on petitioner. Since he is currently on inactive reserve status, he is not required to comply with Air Force uniform regulations. Only if he were to return to active duty (or active reserve status) in the future would the issue arise.

Moreover, it is possible that by the time (if any) that petitioner returns to uniformed duty, the regulations at issue here may have been amended. On October 19, 1984, after the court of appeals denied petitioner's request for rehearing, Congress passed legislation requiring the Secretary of Defense to establish a study group "to examine ways to minimize the potential conflict between the interests of members of the Armed Forces in abiding by their religious tenets and the military interest in maintaining discipline." Department of Defense Authorization Act, Pub. L. No. 98-525, § 554, 98 Stat. 2532. The legislation directs the Secretary, within 20 days of receipt of the report, to issue "appropriate implementing policy."

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[8]In light of the possibility that petitioner's application to be placed on active duty reserve status (which would entail occasional uniformed duty) might be accepted, as well as the possibility (albeit slight) that he would be called up for active duty in an emergency, it cannot be said that this case is entirely without continuing significance.

Pursuant to this legislation, the Secretary has formed a study group and has invited comments from the interested public. 49 Fed. Reg. 48596 (Dec. 13, 1984). The group has been directed to "address the issues of compliance with and modifications of uniform regulations, dietary restrictions, sabbath observance, and facial and body hair length practices," and to "consider the views of a broad spectrum of religious organizations and specialists outside the government." *Ibid.* The report of the study group is expected to be completed by mid-April 1985.

This decisionmaking process initiated by Congress and conducted by the Executive branch under congressional oversight offers the greatest promise for achieving a fair and consistent, yet militarily feasible and justifiable, policy toward religious accommodation in the armed forces. Unlike parties in litigation in district court, the Department of Defense study group will be able to consider the problems of all religious groups significantly represented in the armed forces and will have access to the opinions and ideas of chaplains, religious groups, military leaders and personnel managers, and others with the experience necessary to devise solutions to these sensitive and difficult problems. Particularly in light of this expected report and the action that may be taken upon it, there is no need for review of the court of appeals' decision. The regulations at issue here may be modified without the need for constitutional adjudication; alternatively, if they are retained in substantially the same form, their basis and purpose will have been substantially clarified and the reasons for rejecting alternatives articulated.

We would observe, moreover, that accommodation of religious practices by the political branches, rather than by judicial injunction, is the constitutionally preferred course.

Although in certain unusual circumstances cited by petitioner (*Thomas* v. *Review Board, supra; Wisconsin* v. *Yoder, supra; Sherbert* v. *Verner, supra*), this Court has found that particularized departures from facially neutral laws and regulations are required under the Free Exercise Clause as accommodations to religious practice, it is far more common for the political branches of government to determine the balance — within the limits set by the Free Exercise Clause and the Establishment Clause — between the public's need for uniform application of the law and the occasional need of individuals for specific accommodation of their religious practices. See Gov't Br. for the Sec'y of Labor in *Tony and Susan Alamo Foundation* v. *Donovan*, No. 83-1935, at 40-42;[9] *United States* v. *Lee, supra; Gillette* v. *United States*, 401 U.S. 437 (1971); *Zorach* v. *Clauson*, 343 U.S. 306, 313-314 (1952). Judicial deference to the accommodations reached by Congress and the Executive branch is particularly appropriate here, where the question is the constitutionality of the "Rules for the Government and Regulation of the land and naval Forces" — a subject expressly within the congressional authority under Article I, Section 8, Clause 14 of the Constitution. See *Rostker* v. *Goldberg*, 453 U.S. at 64-65.

In this instance, the court of appeals properly declined to intervene in a matter peculiarly within the expertise of the military; and Congress and the Secretary of Defense have responded, in a spirit of toleration and accommodation, to initiate a process to determine what changes in military practice, if any, might be appropriate. This is as it should be. See *Chappell* v. *Wallace*, slip op. 6, quoting *Gilligan* v. *Morgan*, 413 U.S. at 10 (emphasis in original) (military judgments are "subject *always* to civilian control of the Legislative and Executive Branches").

---

[9]We have provided a copy of our brief in *Alamo Foundation* to counsel for petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
Attorney

MARCH 1985

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No. 84-1097

In The
Supreme Court of the United States
October Term, 1984

S. SIMCHA GOLDMAN,
Petitioner,

v.

CASPER W. WEINBERGER,
SECRETARY OF DEFENSE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

NATHAN LEWIN
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

DAVID J. BUTLER
BROWNSTEIN ZEIDMAN &
SCHOMER
1401 New York Avenue, N.W.,
Suite 900
Washington, D.C. 20005
(202) 879-5700

Attorneys for Petitioner

Of Counsel:

DENNIS RAPPS
National Jewish Commission
on Law and Public Affairs
450 Seventh Avenue, Suite 2203
New York, NY 10001
(212) 563-0100

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In The

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

ARGUMENT

1. Twice in his Brief in Opposition, the Solicitor General refers to the "study" now being conducted by the Department of Defense over conflicts between religious tenets and military requirements (Br. in Opp. 7, 11-12). He argues that this procedure, mandated in the Department of Defense Authorization Act, 98 Stat. 2532, "offers the greatest promise for achieving a fair and consistent, yet militarily feasible and justifiable, policy toward religious accommodations in the armed forces." Br. in Opp. 12.

In fact, the "study" did not originate with the armed forces. It was accepted by the military only as a means of

avoiding legislation that would have squarely overruled the decision below. Appendix I to this Reply Brief is a copy of an article that appeared in *The Washington Post* of June 6, 1984, reporting on the extensive pressure placed on legislators who attempted to enact a law overruling the conclusion reached by the Court of Appeals. Such a law was, in fact, adopted on the floor of the House of Representaives, 130 Cong. Rec. (daily ed.) H4839, May 24, 1984. When the armed services' efforts to scuttle all proposed legislation failed, the Department of Defense urged a "study" of the subject.[1] It is the opinion of undersigned counsel, who personally appeared before the study group, as well as the opinion of others who have presented the views of religious minorities to that group, that no change in the heretofore inflexible position of the armed forces is likely. This Court should not, we submit, permit the judgment below to stand merely because of an unsubstantiated

---

[1]When Senator Hatch accepted the armed services' "study" alternative, he stated on the floor of the Senate (130 Cong. Rec. (daily ed.) S7421, June 15, 1984):

> In offering this legislation and directing that the military service conduct a thorough study of this subject and that t. ey issue appropriate regulations, I do not mean to suggest that the basic, underlying constitutional question should not be decided promptly by the courts in favor of religious freedom. I think it is important that the court of appeals consider the Goldman case en banc, and I would hope that the full Court would reverse the unfortunate decision of the lower *[sic]* court. I also hope that if the court of appeals does not so rule, the Supreme Court of the United States grants certiorari and reverses the Goldman decision.

Senator D'Amato thereafter indicated that he would have preferred the bill enacted by the House, but that he believed the "study" proposal was "the most specific measure we could expect to pass the Senate" because of the opposition of the armed services. *Id.* at S7422.

possibility that the regulations "may be modified without the need for constitutional adjudication." Br. in Opp. 12.

Indeed, this Court is not powerless to remove this case from its docket if the constitutional issue is ultimately mooted by a change in the regulations *after* certiorari has been granted. Should our prediction concerning the study group prove wrong — *i.e.*, should the group propose, and the military services adopt, amended regulations that permit military personnel to practice innocuous and inoffensive religious tenets such as the wearing of a yarmulke — we will promptly notify the Court and, if it is then deemed appropriate, the writ could be dismissed. A denial of certiorari at this juncture, on the other hand, would simply be taken by the armed services as judicial ratification of the policy sustained by the court of appeals and as a signal that no modification of the regulations is warranted.

2. The Solicitor General chides us for failing "to take into consideration the inherent distinctions between civilian and military life." Br. in Opp. 11. But we did note that this Court has repeatedly said that there are limits to the restrictions that may constitutionally be imposed on the military. See Pet. 6-7. And the Solicitor General fails to distinguish between restrictions on fundamental First Amendment liberties and limitations on more generalized interests in personal grooming. *Kelley* v. *Johnson,* 425 U.S. 238 (1976) — cited as primary authority in the Brief in Opposition (pp. 4-5) — involved a claim based on a Fourteenth Amendment "liberty" in "matters of personal appearance." 425 U.S. at 244. The Court noted that this claimed constitutional interest was different in kind from the privacy interests asserted in earlier cases culminating with *Roe* v. *Wade,* 410 U.S. 113 (1973). And *Kelley* v. *Johnson* surely did not hold that a specific First Amend-

ment free-exercise claim could be overriden by a police-force regulation governing personal appearance and grooming.

Nor is *United States* v. *Lee,* 455 U.S. 252 (1982), on which the Solicitor General relies (Br. in Opp. 7-8, 9), controlling here. This Court found in *Lee* that there is a broad public interest in "a sound tax system" that cannot be accommodated by permitting religious exemptions from the obligation to pay a tax. The Court said, "The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." 455 U.S. at 260. No similar compelling interest and – more importantly – no significant harm resulting from an exemption can be asserted in the present circumstances. Perfect uniformity of dress in the military is not as essential to the nation as the functioning of the tax system, and allowing minor, virtually unobtrusive variations from strict uniformity of dress would surely not prevent the military from functioning.

3. Finally, the horrible spectre that "many religious adherents" would make demands for exemptions from the dress requirements (Br. in Opp. 5) rests on no factual basis whatever. It is simply a pretext for denying a fundamental right of conscience when no cognizable harm can be shown to result from recognition of the specific right asserted. The absence of any "clinical or other studies" by the military – that was noted by the district court – is surely relevant to this aspect of the respondent's constitutional justification. Excusing the Amish, on constitutional grounds, from certain formal schooling (*Wisconsin* v. *Yoder,* 406 U.S. 205 (1972)) did not produce a flood of

parents seeking similar exemptions. The constitutional obligation to grant unemployment benefits to Sabbath-observers who reject Saturday work for religious reasons (*Sherbert* v. *Vener,* 374 U.S. 398 (1963)) or to religious observers whose faith keeps them from accepting certain kinds of employment (*Thomas* v. *Review Board,* 450 U.S. 707 (1981)) is not overridden by the frightening prospect that others may choose such a course to shirk honest labor. By the same token, the liberty of an Air Force psychologist to wear a small religiously commanded skullcap should not be overriden because of sheer surmise that there might be others making similar claims for variant dress that would seriously interfere with the exercise of military duties.

CONCLUSION

For the foregoing reasons and those stated in our Petition, the writ of certiorari should be granted.

Respectfully submitted,

NATHAN LEWIN
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

DAVID J. BUTLER
BROWNSTEIN ZEIDMAN &
SCHOMER
1401 New York Avenue, N.W.,
Suite 900
Washington, D.C. 20005
(202) 879-5700

Attorneys for Petitioner

Of Counsel:

DENNIS RAPPS
National Jewish Commission
on Law and Public Affairs
450 Seventh Avenue, Suite 2203
New York, NY 10001
(212) 563-0100

April 8, 1985

APPENDIX I

The Washington Post, June 6, 1984, Page A2

DRESS BATTLE

Pentagon Up in Arms for Uniformity As Yarmulke Issue Gains in Congress

By Margaret Shapiro
Washington Post Staff Writer

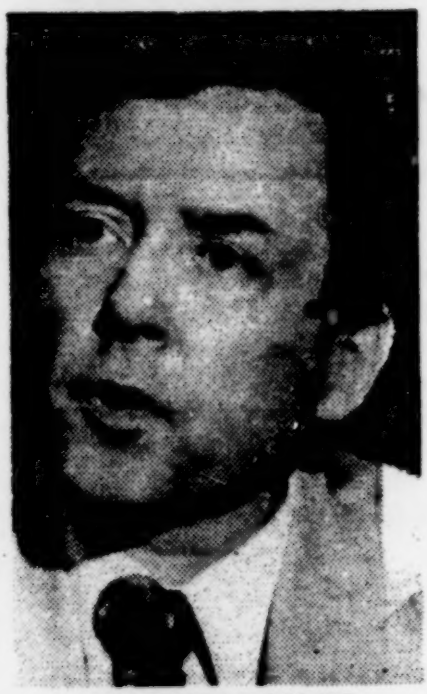
The military is proud of its uniforms, and one of the things it likes most about them is their uniformity.

So the Pentagon was greatly disturbed last week when the House passed an amendment to the defense authorization bill allowing members of the armed forces, on a one-year trial basis, to wear "unobtrusive religious headgear," such as Jewish skullcaps or yarmulkes.

When Sen. Orrin G. Hatch (R-Utah) picked up the issue in the Senate, the Pentagon panicked.

"To them it's the slippery slope, a Pandora's box that, once opened, can't be closed," said the aide of one senator backing the yarmulke amendment. "If Orthodox Jews wear yarmulkes, then Rastafarians will wear dreadlocks and smoke dope on coffee breaks and Hare Krishnas will wear their saffron robes when they're out fixing a helicopter."

Hatch's proposed amendment was sparked by a federal appeals court decision here last month. The court, considering the case of an Air Force captain who was disciplined for wearing a yarmulke, ruled that the armed forces have the right to determine dress for those on active duty.



SEN. ORRIN G. HATCH
... stand is under siege by Pentagon

Many Jewish leaders were upset about the court decision. In response, Rep. Stephen J. Solarz (D-N.Y.) introduced the House amendment, which easily passed during recent consideration of the fiscal year 1985 defense authorization bill.

Hatch sent out a "Dear Col-

BEST AVAILABLE COPY

league" letter this week, seeking support for an identical amendment when the Senate debates the defense bill, possibly this week.

The Pentagon quickly counterattacked. Over the past two days, Hatch's office has been besieged with telephone calls from top-ranking officers in each branch of the military, requesting time with the senator to show him the error of his ways.

Three two-star generals appeared in person yesterday saying the amendment could destroy the military's esprit.

Allowing yarmulkes, the military has argued, would raise demands by other religious groups. The distinctive uniform requirements of war accords would be jeopardized and the military would be faced with the bureaucratic nightmare of deciding what headgear is unobtrusive and what is not, it contends.

"Jews are just one of 47 religious groups or subgroups in the military," one opponent of the amendment complained. "What we're talking about is the ability to control while in uniform 2 million people, not a group of religious sects who are showing religious differences while in uniform."

So far, none of it has persuaded Hatch, a deeply religious Mormon, who is uncomfortable opposing the military establishment.

"He's the last person who would harm the national security," said one aggrieved aide. "There is no more staunch supporter of the armed forces than Orrin Hatch."

According to aides, Hatch feels strongly that servicemen should not have to choose "between their sincere religious beliefs and their desire to serve their country." The House amendment and Hatch's stipulate that the headgear can not interfere with duty.

Supreme Court, U.S.
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CLERK

No. 84-1097 (9)

In The
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October Term, 1985

S. SIMCHA GOLDMAN,
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v.

CASPER W. WEINBERGER,
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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

NATHAN LEWIN
2555 M Street, N.W.
Suite 500
Washington, D. C. 20037
(202) 293-6400
Counsel of Record for Petitioner

OF COUNSEL:
DAVID J. BUTLER
Brownstein Zeidman & Schomer
1401 New York Ave., N.W.
Suite 900
Washington, D. C. 20005
(202) 879-5700

DENNIS RAPPS
National Jewish Commission on Law and Public Affairs
450 Seventh Avenue
New York, N. Y. 10001
(212) 563-0100

CHARLES FRIED
Acting Solicitor General
Counsel of Record for Respondent

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July 2, 1981	Application by Plaintiff for Temporary Restraining Order
July 2, 1981	Temporary Restraining Order
July 2, 1981	Motion for Temporary Restraining Order Argued and Granted
July 10, 1981	Motion for Preliminary Injunction Argued and Granted
July 13, 1981	Memorandum Opinion of the United States District Court
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May 8, 1984	Opinion for the United States Court of Appeals filed by Senior Circuit Judge Swygert
May 8, 1984	Judgment by the United States Court of Appeals that the Judgment of the United States District Court Appealed from is Vacated and the Case is Remanded
June 22, 1984	Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc
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August 27, 1984	Mandate Issued
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1522

S. SIMCHA GOLDMAN,
449 North Laurel Avenue
Los Angeles, California 90048
(213) 655-9410

Plaintiff,

v.

SECRETARY OF DEFENSE,
The Pentagon
Washington, D.C. 20301

and

SECRETARY OF THE AIR FORCE,
The Pentagon
Washington, D.C. 20301

Defendants.

COMPLAINT FOR DAMAGES AND DECLARATORY AND INJUNCTIVE RELIEF

(Filed July 2, 1981)

1. This action arises under the Free Exercise Clause of the First Amendment to the United States Constitution. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1361.

2. Plaintiff is a member of the Orthodox Jewish faith, and is an ordained rabbi. Defendants are officials of the United States of America and this action is brought against them in their official capacities.

3. Plaintiff is a Captain in the United States Air Force on active duty, and has been stationed at March Air

Force Base ("March AFB"), Riverside, California, since September 1977. Plaintiff is currently assigned to the Mental Health Clinic of the Air Force Regional Hospital at March AFB, where he serves as a clinical psychologist.

4. Orthodox Jewish religious practice requires a Jewish male to keep his head covered at all times. In observance of that religious requirement, plaintiff wears a skull cap ("yarmulke") at all times.

5. Plaintiff has continuously worn a yarmulke since prior to his assignment to March AFB. Since his assignment to March AFB in September 1977, plaintiff has continuously worn a yarmulke, including while he is in uniform, as required by his religion.

6. For the three and one-half year period from September 1977, to May 1981, plaintiff's superior officers at March AFB raised no objection to his wearing a yarmulke while in uniform.

7. On May 8, 1981, Colonel Joseph Gregory, the Hospital Commander at March AFB, informed plaintiff that wearing a yarmulke violated the Air Force's Dress Code Regulation (AFR) 35-10. Colonel Gregory ordered plaintiff to cease wearing a yarmulke indoors while in uniform at all places on base, except that plaintiff was specifically permitted to continue wearing his yarmulke while working and in uniform at the Regional Hospital located on the base.

8. Upon receiving the May 8, 1981, order, plaintiff informed Colonel Gregory that the wearing of a yarmulke was required by his Orthodox Jewish religion and was a protected religious observance pursuant to the First Amendment. Plaintiff requested permission to continue his previously unchallenged practice of wearing a yar-

mulke at all times and in all places while in uniform at March AFB. Plaintiff's request was denied.

9. On May 19, 1981, in an effort to avoid litigation, plaintiff's counsel contacted the Office of the Air Force Assistant General Counsel for Manpower and Personnel Affairs, explained plaintiff's situation, and requested that the Air Force continue to permit plaintiff to wear his yarmulke at all times as he had for the past three and one-half years. Counsel's efforts to resolve this matter through negotiations extended over a period of several weeks, but were not successful.

10. On June 23, 1981, plaintiff was ordered by Colonel Gregory to cease wearing his yarmulke anywhere while in uniform at March AFB, including the Regional Hospital. Plaintiff was again informed that wearing a yarmulke violated AFR 35-10.

11. Plaintiff explained once again the nature of his religious observance and his desire to continue wearing his yarmulke at all times, as required by his religion. Plaintiff requested permission from Colonel Gregory to appear for duty in civilian clothes, pursuant to an express exemption contained in AFR 35-10, so that his wearing of a yarmulke would not violate defendants' interpretation of the regulation. Plaintiff's request was denied.

12. On June 24, 1981, plaintiff received a letter of reprimand from Colonel Gregory for continuing to wear his yarmulke while in uniform in violation of the June 23 order, and in violation of defendants' interpretation of AFR 35-10. Plaintiff has been threatened with additional sanctions, including a court-martial, for violation of the

June 23 order and for violation of defendants' interpretation of AFR 35-10.

13. Following receipt of the letter of reprimand, plaintiff submitted a written request to Colonel Gregory that formal processing of the letter of reprimand be delayed until June 29, 1981, the date upon which plaintiff's military area defense counsel was scheduled to return to March AFB. Plaintiff's request was granted.

14. On June 25, 1981, plaintiff was summoned to Colonel Gregory's office and was informed by Colonel Gregory that, in light of plaintiff's current problems with the Air Force, resulting from plaintiff's insistence upon wearing his yarmulke despite the provisions of AFR 35-10, Colonel Gregory had decided to withdraw a previously positive recommendation he had submitted in favor of plaintiff's application for a one year extension of his service in the Air Force, and had, that day, submitted a negative recommendation on that application.

15. The orders issued to plaintiff prohibiting him from wearing a yarmulke while in uniform at March AFB violate the First Amendment of the United States Constitution.

16. Plaintiff has exhausted all meaningful available channels to postpone enforcement of the June 23 order, or to have the order withdrawn. There is no further appeal within the Air Force from the punitive actions taken against plaintiff and threatened to be taken against plaintiff, as specified in paragraphs 7 through 14 of this Complaint.

17. The actions already taken against plaintiff and the threat of additional sanctions against plaintiff, includ-

ing criminal prosecution, if he does not cease wearing a yarmulke while in uniform, jeopardize plaintiff's ability to observe deeply held religious beliefs, violate the First Amendment to the United States Constitution, and jeopardize plaintiff's ability to continue serving in and to be employed gainfully by the Air Force.

18. Any effort by defendants or anyone acting under their supervision or control to enforce or apply AFR 35-10 against plaintiff or any enlisted man who wears a yarmulke for religious reasons, is an unconstitutional denial of rights guaranteed by the First Amendment to the United States Constitution.

WHEREFORE, plaintiff prays that this Court enter an Order:

1. Declaring that the conduct described in paragraphs 7 through 14 of this Complaint violates the First Amendment to the Constitution of the United States;

2. Declaring Air Force Dress Code Regulation (AFR) 35-10 invalid and unlawful as applied to any person who wears a yarmulke for religious reasons;

3. Enjoining the defendants, their agents, subordinates, or anyone acting in concert with them from applying or enforcing AFR 35-10 against plaintiff or any person who wears a yarmulke for religious reasons;

4. Directing defendants, their agents, subordinates or anyone acting in concert with them, to expunge from plaintiff's military records all references to disciplinary action, sanctions or penalties (including Colonel Gregory's negative recommendation concerning plaintiff's continued military service) resulting directly or indirectly from plain-

tiff's insistence upon wearing a yarmulke, despite the provisions of AFR 35-10;

5. Awarding plaintiff damages, attorneys' fees and costs of this action; and

6. Granting such other and further relief as this Court deems just and proper.

/s/ Nathan Lewin/DJB
MILLER, CASSIDY, LARROCA & LEWIN
Suite 500
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

/s/ David J. Butler
Robert A. Smith
BROWNSTEIN ZEIDMAN AND SCHOMER
Suite 900
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 457-6500
Attorneys for Plaintiff

Dated: 7/2/81

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1522

S. SIMCHA GOLDMAN,

Plaintiff,

v.

SECRETARY OF DEFENSE, *et al.*,

Defendants.

ANSWER

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

Plaintiff has failed to exhaust his administrative remedies.

Third Defense

The defendants answer the numbered paragraphs of the complaint as follows:

1. This paragraph contains plaintiff's characterization of his action, jurisdiction allegations, and conclusions of law, to which no answer is required, but insofar as an answer may be deemed to be required, defendants deny.

2. Admit.

3. Defendants admit this paragraph accurately describes plaintiff's status in the Air Force on the date the complaint was filed. Defendants aver that as of September 1, 1981, plaintiff is no longer on active duty in the Air Force, no longer is assigned to the Air Force Regional

Hospital at March Air Force Base. Defendants further aver that plaintiff still holds a Reserve commission in the United States Air Force.

4. Deny first sentence. Deny second sentence, except admit that plaintiff wears a skull cap ("yarmulke") at all times.

5. Admit first sentence. Admit second sentence, except deny that wear of the yarmulke is required by plaintiff's religion.

6. Admit.

7. Admit.

8. Admit.

9. Admit.

10. Admit.

11. Admit first sentence, except deny that the wear of a yarmulke is required by plaintiff's religion. Admit second and third sentences.

12. Admit.

13. Admit.

14. Admit.

15. This paragraph contains conclusions of law and not allegations of fact to which an answer may be deemed required, but insofar as an answer may be deemed required, defendants deny.

16. Admit first sentence. Admit second sentence, except deny there is no further appeal within the Air Force concerning the letter of reprimand plaintiff has re-

ceived. Defendants aver that the Air Force Board for Correction of Military Records offers plaintiff a forum for exhaustion of administrative remedies under 10 U.S.C. § 1552 (See 32 C.F.R. § 865.1 et. seq.).

17. This paragraph contains plaintiff's characterization of his action and conclusions of law, to which no answer is required, but insofar as an answer may be deemed to be required, defendants deny.

18. This paragraph contains plaintiff's conclusions of law to which no answer is required, but insofar as an answer may be deemed to be required, defendants deny.

Defendants are not required to answer plaintiff's Prayer of Relief. Answering further, any and all allegations of the Complaint not hereinbefore specifically answered are denied.

Respectfully submitted,

/s/ Charles F. C. Ruff
United States Attorney

/s/ Royce C. Lamberth
Assistant United States Attorney

/s/ R. Craig Lawrence
Assistant United States Attorney

OF COUNSEL:

FRANCIS S. MORAN, JR.
Major, USAF
General Litigation Division
Office of the Judge Advocate General
Washington, D. C. 20330

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PLAINTIFF'S DEPOSITION EXHIBIT "A"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 81-1522

S. SIMCHA GOLDMAN,

Plaintiff,

v.

SECRETARY OF DEFENSE, *et. al.*,

Defendants.

DEFENDANTS' RESPONSES TO
PLAINTIFF'S INTERROGATORIES

The following responses by defendants to plaintiff's interrogatories are served upon plaintiff pursuant to Rule 33, Fed. R. Civ. P.:

* * *

2. With respect to plaintiff's service in the Air Force from September 1977 through May 7, 1981:

(a) State in detail and with specificity why plaintiff was permitted to wear his yarmulke while in uniform at March Air Force Base during the entire period;

(b) Describe in detail with specificity, including the date(s) of and all persons involved in, each and every adverse comment, reaction or criticism received by defendants or any of their agents or subordinates regarding plaintiff's wearing of his yarmulke while in uniform during the entire period; and

(c) Identify each and every document which relates directly or indirectly to your answers to this interrogatory.

Response to 2.

(a) When Captain Goldman came to March AFB in 1977 he kept a low profile in and about the hospital. He did not take his meals in the cafeteria and did not often leave his duty station at the mental health clinic. To and from work he wore his service cap over the yarmulke. In 1978 Col. Smith, the hospital commander, received a complaint about wearing the yarmulke at the hospital. He contacted the Surgeon General at HQ SAC and was advised that it was his decision as commander whether or not to allow it. Col. Smith decided not to confront Capt. Goldman over the issue. In August of 1980 Col. Smith was replaced by Col. Gregory. Col. Gregory questioned whether or not Capt. Goldman should be allowed to wear the yarmulke while in uniform. He was advised by Col. Robert Young, then hospital administrator, now a member of HQ SAC/SG staff, that the previous hospital commander had allowed it. Because of this Col. Gregory decided not to confront Capt. Goldman at that time.

(b) In 1978 the hospital commander, Col. Smith, received a complaint from CMS. George Johnson, the NCOIC of nursing services, about Capt. Goldman wearing a yarmulke on duty at the hospital. In April 1981, Maj. Rakowsky received a complaint from Capt. Daniel F. Bouchard, circuit trial counsel, that Capt. Goldman had appeared to testify in a court-martial wearing a skull cap. This complaint was relayed to the hospital commander, Col. Gregory.

(c) Affidavit of CMS. George Johnson dated 23 July 81. Affidavit of Capt. Daniel F. Bouchard dated 16 July 81.

3. With respect to Colonel Gregory's order issued to plaintiff on or about May 8, 1981, directing plaintiff to stop wearing his yarmulke while in uniform at all places at March Air Force Base other than the Regional Hospital:

(a) Explain in detail and with specificity the basis for Colonel Gregory's order;

(b) State whether you maintain that plaintiff's wearing of his yarmulke while in uniform at the Regional Hospital violates the provisions of AFR 35-10;

(c) Identify each and every person with whom Colonel Gregory consulted in connection with his decision to issue the May 8, 1981 order to plaintiff; and

(d) Identify each and every document which relates directly or indirectly to your answers to this interrogatory.

Response to 3.

(a) Prior to April of 1981 Col. Gregory had been advised and believed that Capt. Goldman had permission to wear the yarmulke at the hospital. In April 1981 he was advised that Capt. Goldman had appeared to testify in a court-martial wearing the yarmulke in violation of AFR 35-10. Based upon this information and Col. Gregory's understanding that Col. Smith had allowed Capt.

Goldman to wear the yarmulke at the hospital, Col. Gregory ordered Capt. Goldman to wear the yarmulke only at the hospital.

(b) Yes.

(c) Col. Charles C. McDonald
Maj. Ronald J. Rakowsky
Lt. Col. Ledro Justice
Col. James R. Plummer
Col. Julius Archie

(d) Memo dated 8 May 1981.

* * *

5. With respect to Colonel Gregory's June 23, 1981 order to plaintiff directing that he remove his yarmulke at all times and at all places while in uniform:

(a) Explain in detail and with specificity why Colonel Gregory changed his order from that initially issued on May 8, 1981;

(b) Identify each and every individual with whom Colonel Gregory consulted with respect to the issuance of his June 23, 1981 order; and

(c) Identify each and every document which related directly or indirectly to your answers to this interrogatory.

Response to 5.

(a) From the period of May 8, 1981 to June 23, 1981, the parties in this dispute were attempting to reach an acceptable compromise. Col. Plummer, the installation Chaplain contacted Chaplain Madden at HQ SAC/HC in order to ascertain

whether or not the wearing of a yarmulke was a requirement of the Jewish Orthodox religion. Chaplain Madden did not know so Col. Plummer contacted Rabbi Selwyn G. Geller at HQ ATC/HC. Rabbi Geller advised Col. Plummer to contact the Jewish Welfare Board (JWB), Col. Plummer was advised by both Dr. Coram and Rabbi Messing at the JWB the wearing of a yarmulke was highly recommended and encouraged but as not required. A Rabbi Kobrinetz, USAF Reserve colonel, was sent to March AFB to speak with base command personnel and Capt. Goldman in an attempt to resolve the matter. On June 15, 1981, while Rabbi Kobrinetz was at March AFB, Col. Gregory was contacted by Brig. Gen. Greendyke, HQ SAC/SG, who advised Col. Gregory to order Goldman not to wear the yarmulke at anytime while in uniform. Col. Gregory spoke with Col. McDonald and was advised to take no action until Rabbi Kobrinetz had had an opportunity to speak with Captain Goldman. After all attempts to resolve the matter failed, on June 23, 1981, Col. Gregory ordered Capt. Goldman not to wear the yarmulke while in uniform.

(b) Col. Plummer, Maj. Rakowsky, Col. McDonald, Brig. Gen. Greendyke, Col. (Rabbi) Kobrinetz.

(c) Two memos for record dated 15 June 1981; memo for record dated 22 June 1981; three memos for record dated 23 June 1981; order dated 23 June 1981.

6. With respect to Colonel Gregory's issuance of a letter of reprimand to plaintiff on June 24, 1981:

(a) State in detail and with specificity why Colonel Gregory felt it necessary and appropriate to issue a letter of reprimand or to pursue any sanctions against plaintiff for his failure to remove his yarmulke while in uniform;

(b) Identify each and every individual with whom Colonel Gregory consulted with respect to the issuance of a letter of reprimand to plaintiff on June 24, 1981;

(c) State the substance of each and every discussion between or among Colonel Gregory and any individual identified in response to subparagraph (b) above; and

(d) Identify each and every document which relates directly or indirectly to your answers to this interrogatory.

Response to 6.

(a) On June 23, 1981 Capt. Goldman was given a direct and lawful order by his commander, Col. Gregory, not to wear his yarmulke while in uniform. On June 24, 1981 Capt. Goldman appeared in uniform, wearing the yarmulke, in violation of Col. Gregory's order and in violation of AFR 35-10. For this reason he received a letter of reprimand for violation of AFR 35-10.

(b) Col. McDonald, Col. Blaisdale, Col. Plummer, Lt. Col. Hayslett, Major Rakowsky.

(c) Discussions with the above parties involved the active participation and advice of Major Ronald J. Rakowsky in his capacity as legal advisor. The

substance of any discussion is therefore privileged. In one discussion subsequent to the June 24, 1981 letter of reprimand and prior to Capt. Goldman's response Col. Gregory spoke with Col. McDonald and was advised that any action taken should be commensurate with the offense and that if Capt. Goldman continued to violate Col. Gregory's order and AFR 35-10 future progressive levels of discipline should be taken.

(d) Two memos for record dated 15 June 1981; memo for record dated 22 June 1981; three memos for record dated 23 June 1981; order dated 23 June 1981; two memos for record dated 24 June 1981.

7. With respect to Colonel Gregory's decision to withdraw his previously positive recommendation on plaintiff's application for an extension of service in the Air Force and to substitute, in its stead, a negative recommendation on that application:

(a) State in detail and with specificity why Colonel Gregory felt it necessary and appropriate to withdraw his previously positive recommendation and substitute a negative recommendation against plaintiff for his failure to remove his yarmulke while in uniform;

(b) Identify each and every individual with whom Colonel Gregory consulted with respect to his withdrawal of his previously positive recommendation and substitution of a negative recommendation against plaintiff on June 24, 1981;

(c) State the substance of each and every discussion between or among Colonel Gregory and any individual identified in response to subparagraph (b) above; and

(d) Identify each and every document which relates directly or indirectly to your answers to this interrogatory.

Response to 7.

(a) In early May 1981 the Air Force Office of Special Investigation (AFOSI) completed an investigation of Capt. Goldman concerning allegations that he had received monetary compensation for work performed off-base during normal duty hours. At this same time Capt. Goldman went to Col. Gregory with a request to extend his service in order to apply for indefinite reserve status. Because of the unfavorable information contained in the AFOSI report Col. Gregory gave Capt. Goldman a tentative positive recommendation. When Capt. Goldman's subsequent behavior showed a disregard for Air Force regulations and command authority Col. Gregory decided to withdraw the tentative recommendation and replace it with a negative recommendation.

(b) Col. McDonald, Col. Blaisdell, Col. Plummer, Lt. Col. Hayslett, Major Rakowsky.

(c) The discussions involved the active participation of Major Ronald J. Rakowsky in his capacity as legal advisor and the substance of said discussions is privileged.

(d) AFOSI investigation No. 8118D95-18; letter of reprimand; request to establish active digest file with attachments.

8. Identify each and every person, civilian or military, who has complained to defendants or any of their agents concerning plaintiff's wearing of a yarmulke while in uniform at March Air Force Base, and with respect to each person identified, state the substance of their objections, the date on which each such objection was made, and to whom each such objection was made, and identify each and every document which relates directly or indirectly to your response to this interrogatory.

Response to 8.

CMS George Johnson, NCOIC of Nursing Services, complained to Col Lawrence Smith, the hospital commander, in 1978. He related that several of the younger Air Force members were upset that they were required to live up to standards of dress and Grooming while Capt. Goldman was not. In April of 1981 Capt. Daniel F. Bouchard, Circuit Trial Counsel, complained to Major Ronald J. Rakowsky, the Staff Judge Advocate, that Capt. Goldman had appeared to testify in a court-martial wearing a skull cap in violation of AFR 35-10. CMS. Johnson has executed an affidavit dated 23 July 81 and Capt. Bouchard has executed an affidavit dated 17 July 81. Charles Thompson (MSgt, retired) sent a letter to Maj. Gen. Emmanuel, Assistant Deputy Chief of Staff for Manpower and Personnel, a copy of which is delivered herewith to plaintiff. H. Katz sent a postcard to Judge Robinson, c/o March Air Force Base, a copy of which is delivered herewith to plaintiff. Ted Barbee sent

a letter to the Secretary of Defense, a copy of which is delivered herewith to plaintiff.

9. With respect to Air Force Regulation 35-10:

(a) State all exemptions which have been permitted by the Air Force to the express requirements of AFR 35-10, and identify all individuals who have requested such exemptions and all documents which relate directly or indirectly to requests for such exemptions;

(b) State whether the Air Force allows ministers or other religious functionaries to wear clothing other than that specified in AFR 35-10, and if so, describe in detail and with specificity each variation permitted;

(c) State whether there are other individuals in the Air Force whom the Air Force allows to wear a yarmulke despite the provisions of AFR 35-10, and, if so, identify each and every such individual;

(d) State whether the Air Force allows for any religious observances which violate the express provisions of AFR 35-10 and, if applicable, state in detail and with specificity each and every such religious observance which the Air Force allows, and identify each and every person in the Air Force for whom such variations are granted;

(e) Identify each and every document which relates directly or indirectly to your answers to this interrogatory.

Response to 9.

(a) No exemptions to AFR 35-10 requirements have been granted to members as a result of their individual request. While provisions for exemption exist in the regulation they apply to certain categories or groups of persons based on medical reasons or operational necessity. Currently, unit commanders are authorized to exempt individual members from shaving as part of the medical treatment for Pseudofolliculitis Barbae (ingrown hairs). Exemptions are granted based on medical recommendation and not individual request and normally do not exceed 90 days. As such, they are temporary in nature and do not constitute a permanent change to appearance standards. Exemption authority for beards is contained in AFR 35-10, Table 1-1, Line 1.

Additionally, the Commander, Office of Special Investigations, has been delegated authority to exempt dress and grooming requirements for selected members engaged in investigative and counterintelligence situations where strict adherence to the standards could compromise the operations. Waiver requests and approval, dated 29 September 1974, 4 November 1974 and 5 May 1978.

Authority for exemptions in both of the above cases is delegated to field commanders for use on an as required basis. Names of members granted the waivers are not readily available as we have established no requirement for units to report the desired data.

(b) Chaplains and chapel management personnel wear vestments, appropriate civilian attire, or the prescribed Air Force uniform when they conduct or assist with worship services, liturgies and ceremonies. (para 11, AFR 265-1) These are normally scheduled occasions, such as Sunday/Sabbath services and scheduled services on holy days established in the liturgical calendar of the religious group to which the celebrant belongs. Vestments, or portions thereof, might also be worn by a chaplain in performance of emergency rites, such as baptisms, confessions, or last rites for the dying, which by nature are not scheduled events. In such cases, wearing of non-uniform items would be only during the actual performance of the rite. Vestments of civilian attire worn for scheduled observances, or portions of such vestments worn for emergency ministries, are limited to those prescribed by the religious group to which the celebrant belongs.

(c) Exemption authority for AFM 35-10 standards of dress and grooming rests with the Air Force Manpower and Personnel Center, Randolph Air Force Base, Texas. No exemption has been granted to wear a yarmulke. Defendants have recently discovered an individual on active duty, Chaplain (Rabbi) Fred Lewin, who is known to wear a yarmulke in uniform. To our knowledge, he has not applied for nor been granted, an exemption to do so.

(d) Dress provisions described in paragraph (b) above although not specifically addressed in AFR 35-10 are permitted during scheduled religious ob-

servances or emergency ministries for the duration of services only. In addition, chaplains conducting military religious ceremonies give guidance for wear of military headgear. Otherwise, headgear will not be worn during religious services not associated with a military ceremony (AFR 35-10, paragraph 1-6h (2) (d)). Notwithstanding this restriction and the prohibition on wear of non-uniform items with the uniform, wear of the yarmulke while in uniform is allowed while attending Sabbath or holy day services. In these cases, the yarmulke is worn only within the confines of the facility in which the service is held, and only for the duration of the service.

(e) All documents are referenced in response 9. (a)-(d), above.

10. State whether the Air Force has made inquiry concerning, commissioned a study of, or otherwise sought to determine whether the wearing of yarmulke by an airman interferes with the Air Force's performance of its military mission, and if so, identify each such inquiry, and identify each and every document which relates directly or indirectly to your answer to this interrogatory.

Response to 10. No

11. Identify all studies made by the Air Force or relied upon by the Air Force concerning:

(a) Psychological attitudes which contribute to military effectiveness; and

(b) Development and maintenance of intrinsic motivation in the military setting; and

(c) The relationship between strict enforcement of a dress code and discipline, morale, esprit de corps and mission effectiveness; and

(d) The formation of policies regarding uniformity of dress by Air Force personnel, including any harm to the Air Force's military mission caused by lack of uniformity.

Response to 11.

It is impossible to determine specific studies or the confluence of empirical data upon which defendants can reasonably state decisions have been based concerning the four subparagraphs of question 11. However, in an attempt to provide plaintiff with an available source of empirical knowledge in these areas, defendants have attached hereto listings of studies in each of the four areas, not necessarily limited to those made by the Air Force. Such studies are available for production at the Defense Technical Information Center, Cameron Station, Virginia, and may be inspected there.

* * *

13. State in detail and with specificity the basis upon which defendants contest the validity and/or authenticity of plaintiff's religious belief and practice of wearing a yarmulke at all times; identify all persons with whom defendants or their agents have consulted with respect to the validity of plaintiff's observances and practices; and identify each and every document which relates directly or indirectly to your answers to this interrogatory.

Response to 13.

Col. James R. Plummer, the base Chaplain, contacted Chaplain Madden (HQ SAC/HC), Rabbi Geller (HQ

ATC/HC), Dr. Coram (Jewish Welfare Board). He was advised by Dr. Coram and Rabbi Messing that the wearing of a yarmulke is a time honored tradition of the Jewish culture. They further advised that although it is encouraged it is not required. Defendant has also been advised by Rabbi Kobrinetz, a USAF Reserve colonel, that the wearing of a yarmulke is not required.

* * *

The foregoing responses are based upon information furnished by the appropriate staff agencies. I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 17 1981.

/s/ Francis S. Moran, Jr. Major, USAF
General Litigation Division
Office of The Judge
Advocate General
United States Air Force

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 81-1522

S. SIMCHA GOLDMAN,

Plaintiff,

v.

CASPAR W. WEINBERGER,
Secretary of Defense,
Et Al.,

Defendants,

Washington, D. C.
Thursday, September 10, 1981

The above-entitled cause came on for trial before The Honorable Aubrey E. Robinson, Jr., United States District Judge, commencing at 9:42 A.M.

Appearances:

On behalf of the Plaintiff:
David J. Butler, Esq.
Nathan Lewin, Esq.
Robert Smith, Esq.

On behalf of the Defandants:
R. Craig Lawrence, Esq.
Assistant United States Attorney
Maj. Frank Moran, U. S. Air Force
Air Force Litigation Division

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* * *

(p. 10) MR. LAWRENCE: May it please the court: I am Craig Lawrence, Assistant United States Attorney. I represent the defendants in this action.

With me at counsel's table is Major Frank Moran of the Air Force Litigation Division. He will assist in the presentation of the defense.

Your Honor needs very little further introduction into the case currently before you. The critical question remaining for Your Honor's determination is whether the Air Force is able to justify the basis for the regulation and its requirement that uniform dress and appearance standards are necessary to prepare the Air Force to perform its mission.

Your Honor, we will call three witnesses. Those witnesses will reflect in two parts.

General Usher will testify briefly with regard to mission impact and the necessity for the regulation.

(p. 11) Chief Master Sergeant Matthews will testify as to, in particular, reactions to the determinations which have been made as a result of the awareness of Captain Goldman's wearing of the yarmulke.

And, finally, Chaplain Reeves will testify briefly about religious practices and traditional dresswear of other religions.

Your Honor, on that basis, the defendants would call their first witness, Major General Usher, to the stand.

The Court. Very well.

* * *

(p. 12) *Direct Examination*

BY MR. LAWRENCE:

Q. General Usher, would you please state your full name for the record.

A. I am Major General William R. Usher.

Q. General Usher, how long have you been in the Air Force approximately?

A. I have been in the Air Force about 26 years.

Q. General Usher, would you please briefly describe your educational background.

A. I am a graduate of Yale University with a degree in Economics, and I have a master's degree from Harvard University Graduate School of Business Administration.

And I am also a graduate of the Armed Forces Staff College.

Q. General Usher, if you would, please, for the court briefly describe what the mission of the Air Force is today.

A. The United States Air Force, of course, is an instrument of national security of our nation and is responsible for, in concert with the other military services, defending this nation against our enemies.

In short, that means conducting combat operations against an enemy.

Q. What goes into the makeup of a fighting force or a (p. 13) combat ready fighting force, in particular, the Air Force?

A. I think the essence of a successful combat force, of course, involves equipment sufficient to carry into battle to the enemy, weapons which are effective; but, most important, it involves people who are highly trained, motivated, disciplined, and molded into a fighting unit.

Q. General Usher, what part does teamwork play in the makeup of a combat ready fighting force?

A. Teamwork is certainly extremely important, indeed, in many respects, it is the cutting edge.

If I can use, for example, in Air Force combat operations, for instance, we are very much involved in maximizing the number of sorties that we get out of aircraft.

What we want to be able to do is to carry that fight to the enemy as much as we possibly can.

What we are much engaged in then is putting together a sort of a well-oiled machine of people, a team, if you will, when an aircraft lands from a mission, to immediately refuel it and so forth, rearm it, and get it on its way again.

That requires a very high degree of teamwork that has to be practiced a great deal in peacetime to meet needs in wartime.

Q. General Usher, what part does motivation play in the makeup of an effective combat ready fighting force?

A. Well, again, it is part of that cutting edge.

(p. 14) We are a volunteer force, and that is initial element, if you will, of motivation; and the people come into the air force voluntarily. And, of course, when they do so, they do agree to adhere to certain standards.

But to the point of motivation per se, we know that in combat operations that willingness to give the extra effort, the willingness to do that which is above and beyond, more often than not results in success in combat.

Q. General Usher, where does discipline come into play in the makeup of an effective fighting force?

A. Well, of course, combat inevitably involves people's lives; and both for commanders and subordinates, discipline is just absolutely essential because you are asking people to do things that may result in them being injured, them being wounded, and them losing their lives.

And you have to be sure again that this teamwork approach works, that it does not break down, that everybody knows their task, they carry it out in a truly obedient way, and according to the way they have been taught.

You must be able to rely on them. Otherwise, if you cannot, the combat effectiveness of the unit will break down and you are thereby endangering a lot more lives.

Q. General Usher, where does esprit de corps fit into the makeup of an effective combat ready fighting force?

A. Well, we know from experience that people who are (p. 15) proud of their organization, who are not only caused to subordinate their personal interests to the purposes and mission of the organization, but do so willingly and do so as a voluntary matter that they want to serve the purposes of the mission and are proud to do that, then we know we have a more effective fighting unit.

Q. General Usher, what part does image play in the preparation and readiness of a combat ready fighting force?

A. Well, of course, we are a public institution; and all of our members, because we are a uniformed service and people anywhere they go—around here or anyplace—we represent the United States Air Force.

And we represent the United States Government, its officers and men of a uniformed service.

Now, we are in the business, of course, of recruiting people from the American public. We are in the process of gaining public support for the kinds of things that we do in peacetime and then in wartime. And we are in the business of trying to retain those people in our military service after we have invested great amounts of money in training them and so forth.

So when people look at us, they think, "well, there is an example of who is in the Air Force or the Army or the Navy and what have you."

And so our public image is very important to sustaining the United States Air Force as a force, as attracting good (p. 16) people, retaining good people, and thereby having top quality people who are proud of their organization and so forth that they will be a more effective fighting force than if we were less than that.

Q. General Usher, are you familiar, in general, with the requirements of Air Force Regulation 35-10?

A. Yes, I am.

Q. Would you briefly describe what the regulation requires.

A. The regulation is many pages long. It sets up in quite extensive detail what the requirements are for the

wearer of the uniform, men and women in the active and reserve forces of the United States Air Force.

And it states as its purpose that, of course, we are a uniformed force; and as I have just outlined, that pride and esprit and discipline and that sort of thing is important, and it is manifested in the wearer of the uniform.

Again, it portrays the subordination of personal interests to the purpose of the organization, which is essential for an effective military force.

Q. General Usher, are there exceptions to the requirements, dress and appearance requirements, of AFR 35-10?

A. Yes, there are a few.

First of all, for instance, if an individual were to be injured or wounded in combat or something like that, (p. 17) of course, a person would necessarily, because they did not have an alternative, would have to depart from a strict reading of Air Force Regulation 35-10 with respect to the wearer of the uniform.

Q. Could you give an example, General Usher?

A. Well, let us say that somebody was wounded in his arm or something like that, and it required him to wear a sling, Air Force Regulation 35-10, in general, does not call for exceptions. The general rule is that you will adhere to the regulation, for instance, that only authorized combinations are allowed to be worn.

You will not wear items that are not called for in the regulations; and that people, while they are on duty, in fact, will adhere to the stipulations that are in the regulations.

On the other hand, if you had somebody who was wounded in the arm and he had to wear a sling, obviously, that sling is not part of the uniform; it is not technically allowed in 35-10; but on the other hand, really, the individual would have no choice.

And, furthermore, we would want him to do that because we would like to get—let us say, it is his left arm and he is right-handed, and he might be able to do some limited amount of work by writing and so forth, even though he would be restricted perhaps in some other activities.

(p. 18) In other words, we could get some useful service out of him, which would be important particularly in a wartime situation, whereas he is not strictly following 35-10.

Q. That is a general exception that you just discussed that would apply also in peacetime, would it not?

A. It would.

Q. General Usher, are there any religious exceptions to the requirements of 35-10?

A. There is one exception in 35-10. This is as it is stated: It says when somebody is participating in a religious service, that the chaplain in charge of that service may specify the headgear to be worn by individuals while they are participating in that religious service. But it is limited to that.

Q. Are there other religious exceptions, General Usher?

A. No, sir, there are not.

Q. General Usher, what part do the dress and appearance standards of the regulation play in the discipline of a combat ready fighting force?

A. Well, again, I would like to go back to what I said earlier.

When people come into the Air Force, they do so voluntarily. The military is different from the rest of society. We do, when we come in voluntarily, agree to take on certain obligations and we agree to give up certain rights with respect to complete freedom of speech and so forth.

(p. 19) And we do this because, again, we know that to be successful in combat—that is their only real purpose for being in existence—it is necessary to subordinate the personal tastes and interests to the purpose of the organization.

And while one of the most effective ways we have found throughout history and it has been confirmed in combat is that you put people in the same uniform; you standardize; you require them to be part of that organization, be part of that team which has been designed and put together as an effective combat unit.

Q. What happens to discipline when you depart from those uniform standards?

A. Well, when you depart from that, [illegible] start an erosion process.

For instance, if we have in a particular case—here, we have an officer who is not following the regulation; and we have some evidence to indicate that NCO's on the same base felt that that or believed that that eroded their author-

ity to enforce other regulations upon their subordinates and so forth.

Now, it sets a bad example. It is a departure from the standards and norms that are expected.

Now, from a subordinate's standpoint, what you typically hear—in cases that I have been familiar with over my career—is to say, "why are you giving me an Article 15 because I was 15 minutes late to work when so-and-so, you know, is not (p. 20) even wearing the uniform properly?" or "he is not doing that."

You have to have consistency and fairness in order to insure discipline across the board. If you do not have that, discipline begins to break down.

And as I pointed out earlier, discipline is just absolutely essential to success in combat. You cannot have people deciding whether they want to carry out an order under fire or not; otherwise, you would place great numbers of people and their lives in jeopardy.

Q. General Usher, what part do the standards of AFR 35-10 play in the motivation of an effective combat ready fighting force?

A. I think primarily the medium of pride. And we have, I think, an attractive and distinctive uniform. We have tried to keep it plain and simple and so forth over the years.

I think it is recognized by the public and by people of other countries because of humanitarian missions and things that we carry out as a symbol of what is good and just and so forth in the United States.

And we try to pass that tradition, that feeling, on to the individual.

And, therefore, you cannot have somebody deciding that he wants to wear the uniform or parts of it this way or add this to it or take that away from it. You need that (p. 21) standardization in order to engender that pride; and that pride, in turn, engenders motivation.

Q. General Usher, what part do the standards of AFR 35-10, being the uniform dress and appearance standards, play in your teamwork in the makeup of a combat ready righting force?

A. Well, if I can again use the example of the returning airplane. One of the key elements of that is the weapons-loading crew, for instance; and we are talking about fatigues or field uniform.

But they all know that they are part of that team, and they all have the same uniform distinguished by rank, and they know who is in charge; they know who is subordinate.

They know their relationship; they know what they have to do.

They are trained together, and that uniform just helps with that standardization and it helps build that unit's prestige.

Q. In that regard, your flight line, I guess, that you are talking about—is there a safety aspect involved?

A. There is very definitely; and, in fact, that is covered in Air Force Regulation 35-10.

Again, the necessity for standardization comes in here. If an individual is wearing extraneous things of one kind

or another, there is both a safety consideration and there is a monetary consideration.

(p. 22) For instance, let us say we will not let people wear caps of any kind on a flight line or anywhere near a jet engine.

Q. Why is that?

A. Well, for instance, if it were injected into the engine, a couple of things could happen: First of all, an F-15 AF engine costs well over a million dollars a copy and it could absolutely destroy an engine. That is the first thing.

The second thing is there is the possibility the engine might blow up and cause injury or death to other people associated with it, maintaining or flying the aircraft.

So we have to be very, very careful that people adhere to our standards there from a safety standpoint.

Q. General Usher, what part do the standards of AFR 35-10 play in maintaining the Esprit De Corps in a combat ready fighting force?

A. Well, again, the tradition of the uniform is a long one with the Air Force. Since we have been in existence, we have had very, very minor alterations to the appearance of the uniform ever since we became an accepted service in 1947.

Of course, rank is very important to the hierarchial nature of a military force. Ribbons and combat decorations that our people wear are representative of their experience, their valor, their courage in battle, and so forth.

And all of these things are the marks of achievement in a military organization.

(p. 23) And another thing that is not a part of that, tends to depart from that, to divert from that. And it is recognized by an individual's peers, subordinates, superiors, by the public, by foreigners as being the epitome of people in the United States Air Force.

While that builds amongst members of the Air Force, as I say, pride, esprit, they recognize them as they are part of an organization which is well respected throughout this land and others. And they then take pride, and they want to be high performers, if you will, in that organization.

Q. General Usher, how does one person's departure from Uniform Dress and Appearance Standards, as mandated by Air Force Regulation 35-10, affect the ability of the Air Force to perform its mission?

A. I think—in the final analysis, I think it is a matter of where you draw the line.

We have set standards as the regulation itself points out. We have; we have set standards because everybody has personal standards and tastes and what have you, but being a public institution, we have to set those standards for all who are members.

So if one person departs from that, you are setting in motion a process where, if they are not brought back to that standard, you are then saying that you accept that.

And then others will come to you and say, "well, look, (p. 24) I have got a particular thing that I would like to do and why cannot I do that?"

So it begins to unravel; in other words, you cannot draw a line. You have to begin to accept other deviations,

if you will, from the established standard. And I do not know where it would end.

As I pointed out earlier, the other consideration is that, again, it influences discipline. Because then, if you allow this kind of a deviation on the part of an individual, particularly by an individual who is an officer and who is meant to be the epitome of a standard, the example, then it is very difficult then to enforce other kinds of standards or the dress standard itself on other people that are members of the Air Force by supervisors and commanders.

Q. Thank you, General Usher.

MR. LAWRENCE: I have no further questions at this time, Your Honor.

Cross-Examination

BY MR. LEWIN:

Q. General Usher, what is your specific position right now?

A. I am the Director of Personnel Plans at Headquarters, United States Air Force, in Washington, D. C.

Q. So you are located here at the Pentagon in Washington?

A. That is right.

(p. 25) Q. And have you been at any time in charge of March Air Force Base?

A. No, I have not.

Q. Have you been involved specifically with any decisions that the Air Force made concerning the case of Captain Goldman?

A. In the sense of being aware of the kind of the case and being aware of the contents and so forth.

As far as deciding if you are leading to whether we should settle the case out of court or in court, no, that was not my decision.

Q. In terms of command decisions, the whole question of how one deals with Captain Goldman's situation, was not, in fact, under your supervision in any way, was it?

A. No, not under my supervision and—no, it is not.

Q. And do you have any personal knowledge of the consequences of Captain Goldman's having worn his yarmulke while he was at March Air Force Base—personal knowledge?

A. Just from what I have read from the statements that have been brought before in court.

Q. So you are essentially testifying here regarding general desirability of Air Force regulations. Is that correct?

A. I am testifying here to what our regulations are and why they are the way they are, what the standards are.

Q. But with regard to this particular case, you (p. 26) understand, General Usher, do you not, that it involves the question of whether a particular member of the Orthodox Jewish faith in March Air Force Base should be permitted to wear a skullcap which he wears for religious reasons? Do you understand that that is the issue in this particular case?

THE COURT: Well, it may be.

But the reason we are having a trial, as I indicated to you at the outset of this litigation, is that without bringing this into a class action status, what goes for Goldman is going to go for all the other Orthodox Jews in the Air Force. . .

MR. LEWIN: Yes, Your Honor.

THE COURT: . . .For all practical purposes. There is a legal proposition.

Otherwise, we go on endlessly as the Goldmans in the Air Force, the Navy, and the Army choose to litigate this on an individual basis.

It was the Court's opinion that they should not have that burden, nor should the Department of Defense or any of the services have to bear that burden endlessly, especially in view of the fact that we are now going into draft registration where more and more people ultimately will be affected.

And I think it is the kind of situation that dissolves a finite resolution with all of the services, all of the prospective members of the Air Force, to know exactly where they stand vis-a-vis their alleged Constitutional rights.

(p. 27) MR. LEWIN: Yes, Your Honor.

THE COURT: To me, that is an orderly way to resolve the issue.

So that, in a sense, we are concerned about Captain Goldman because it is his case that allows us to address this in an orderly fashion.

This is why there is no particular dispute as to what happened to him. That is why the government's admis-

sions, the Secretary of Defense's admissions, are as candid and as clear as they should be.

MR. LEWIN: Yes, Your Honor.

BY MR. LEWIN:

Q. Your testimony, General Usher, is directed, as my notes indicate, to various particular justifications for an Air Force dress code in general. Is that right?

A. That is correct.

Q. Now, are these specific items that you listed, which I think come down to discipline, teamwork, motivation, esprit de corps, and image—are they based on any specific study that the Air Force has made in this case?

A. Not to my knowledge.

And I would not think that a study would be required; I would think that experience in several wars would be adequate.

Q. And your conclusions in that regard, that you have testified to, are they based on any particular background in (p. 28) psychology, say?

THE COURT: Well, let me interject.

As I understood General Usher, these are not his personal conclusions. These are the conclusions of the United States Air Force, who General Usher represents.

So this does not get into situations of what General Usher's views are.

THE COURT: You are now speaking for the United States Air Force?

THE WITNESS: That is correct.

THE COURT: All right.

BY MR. LEWIN:

Q. In answer to His Honor's question, you said you are speaking for the Air Force. Are these particular items that you enumerated enumerated in some Air Force study based on, say, an expert evaluation of any kind of psychologists or any thing of that kind?

A. Not to my specific knowledge, although they may be.

I am sure the characteristics that I talked about are alluded to in probably numerous Air Force publications, you know, associated with an effective combat force.

Q. I understand.

But is it fair to say that the Air Force has not done any psychological study of the effects of any individuals' departure from the dress code?

(p. 29) A. Not to my knowledge.

Again, I think our experience has put us in good stead here so that we understand . . .

Q. All right.

You say "Not to your knowledge." You are the director of personnel plans. Is that right?

A. That is correct.

Q. So, essentially, it would be your function to be looking into questions—planning regarding personnel, manpower?

A. By all means.

Of course, we have limited resources; and there are certain things that you know that go on.

And, as I say, on the basis of experience—and I am not sure whether an empirical study would necessarily add to this question.

Q. Well, . . .

A. We know through the medium, for instance, if I can give you an example, through the medium of periodic operational readiness inspections in peacetime as well as actual combat experience, I think which many of us have including myself, I think we know beyond doubt what it takes to make an effective combat force.

Another thing comes to mind—and I do not know if it hits the point you are trying to make—but you may recall back in the early seventies where there were difficulties on (p. 30) board a couple of Navy ships.

A subsequent congressional investigation for one thing pointed out that discipline had lapsed below acceptable standards; and part of it was a general slovenliness and departures from Navy uniform regulations that they thought contributed to that.

So I think there is ample evidence to support my assertions with respect to the purpose of the service.

Q. But would you agree with me, General Usher, that with regard to the question of whether an exception to dress code requirements would affect military discipline, if that exception were based on religious needs, that there is really—there are really three separate questions: one is whether a dress code is required and is useful—

that is the first question, and that was the main question you were addressing your attention to. Is that correct?

A. That is correct.

Q. The second question would be whether an exception for a religiously-required form of dress would injure or harm discipline in any way.

That is a second separate question, is it not, rather, distinguished from the first?

A. Well, we do not—we are not attempting through our regulation or anything to abridge anybody's religious freedom.

Q. All right.

(p. 31) A. And we are not—we do not distinguish, in other words, between somebody who would do this for religious purposes or who would do it for any other purpose.

We are saying that, you know, that we have to set standards for various reasons that I have mentioned.

Q. All right.

A. And those standards are there, and we expect everybody who voluntarily—and everybody who is in the Air Force is there as a volunteer and always has been, by the way—that they will accept those standards.

Q. All right.

But you will agree with me, though, that it is possible to consider a subsidiary question of whether a religious exemption would interfere with military discipline? That that could be considered as a separate question—would you agree with that?

A. Again, I will not agree with the question as stated because I say that our position is that we do not make any exception on religious grounds. Of course, we do not distinguish between religious and other grounds.

Q. You do not distinguish between religious and non-religious grounds?

A. That is correct.

Q. All right.

And in that regard, in terms of your own function (p. 32) or any functions that you work on within the Air Force, have you considered the impact of the First Amendment to the United States Constitution in any way, the provision which requires that the United States guarantee the free exercise of religion?

A. Here, of course, we do not believe that our uniformed standards, in fact, abridge those rights in any way.

People are still free to practice their religion as they see fit. And I think, in fact, to get ahead of your point, I think there is a considerable expert opinion that says that, in fact, it is not necessary to wear the yarmulke to practice Orthodox Judaism during the time of employment.

Q. But you will agree that you are not an expert on that?

A. I am not an expert, but I have, in fact, read what others have said. And we have got a lot of Orthodox Jews in the Air Force who do not see any necessity of wearing the yarmulke while they are being employed by the Air Force.

Q. General Usher, with regard to the first question, the general need for the dress code, you say that experi-

ence in fighting wars has demonstrated that it is necessary to have a dress code. Is that correct?

A. Both in wartime primarily, as I mentioned, but also in peacetime as well.

Q. You are familiar with the fact that there have been very successful battles or wars fought by, indeed, United States troops or American troops when there was really no effective (p. 33) dress code?

A. That is correct. But I think also warfare has changed since then, too.

Q. But there was substantial . . .

A. Sure.

Q. . . . if one thinks specifically of the revolutionary forces, for example?

A. That is right.

Q. Would you agree with me that they had substantial esprit de corps?

A. I would.

Q. Would you agree with me that they had substantial motivation?

A. Most of the time.

Q. Would you agree with me that in terms of their image, so far as the Colonists were concerned, that their image was good?

A. In some respects, but let us deal with that for a moment.

Q. Fine.

A. In some respects, they did not have an alternative. There was not any money to buy uniforms or anything like that. We did not have a real independent United States of America.

We did not have worldwide responsibilities. We were not looked upon by people from other countries as a fighting (p. 34) force; we were looked upon as a revolutionary force, not defenders of freedom around the world.

I think the context is entirely different . . .

Q. Because we did not . . .

A. . . . from the present day.

Q. Because we did not have the funds to purchase uniforms?

A. That is one of the reasons, but I think the context is entirely different. I do not think your comparison is all that apropos.

Q. Well, in modern times, do you know of military forces which are effective even when they permit religious adherents to wear yarmulkes, for example?

A. I am sure there may well be.

Q. Like the Israeli Air Force. Do you know about the Israeli Air Force . . .

A. Well, the Israeli Air Force, that may well be; and perhaps you may find that there are other cases.

But we are dealing with an American fighting force, which I think—the Israeli Air Force, for example, is a unique and peculiar situation where you have basically a religious state. We do not have that here.

We have people from all religious beliefs, walks of life, and some with no religious beliefs that are members of our armed forces. I think we have to take that into account.

(p. 35) Again, we have to deal with that public image, the American public expectations of their fighting forces, which is essentially different.

Q. I understood you to testify, General Usher, that the key reason why an exception or a departure from AFR 35-10 would affect the Air Force, is that other people would view it as a violation of military discipline and it would be impossible to draw the line. Is that correct?

A. That is correct essentially.

Q. In fact, if there were an exception for religious-belief-motivated departures from Air Force code, Air Force dress code, then such departures would be authorized by the regulations, would they not?

A. Presumably.

Q. And, consequently, people who would wear clothing such as a yarmulke, which is a departure from the Air Force code pursuant to that exception, would not be violating the Air Force regulation. Is that right?

A. If specifically authorized, yes, sir.

Q. So in those circumstances, it would be clear to other personnel that those departures are not violations of discipline but are, in fact, permitted by the Air Force?

A. But it might be very difficult to explain that to people who hold different beliefs?

They might feel that, in fact, we were making an (p. 36) unique exception.

What would you say to somebody who said, "look, I have a religious belief where I have to wear a saffron "robe"? Would you go along with that?

Q. Have you, General Usher, in your—how many years?—is it 27 years in the Air Force?—encountered any Air Force enlisted man or commissioned officer who wishes to wear a saffron robe for religious reasons?

A. No, I have not, but I have heard of instances where people wanted to do other things with respect to what they could wear with their uniform.

Q. For religious reasons?

A. In some cases some of them espoused religious beliefs, you know, like wearing combs and things like that, saying that that is part of their religious belief.

I have not personally been involved in a case, but I have heard about an inference.

Q. All right.

Is there any other case that you know that you have been personally involved that has involved a request to wear a different article of clothing for religious reasons?

A. Not personally involved, no.

Q. And you say you have heard of other cases. What is the most extreme case you have heard of?

A. I think probably the most extreme case that I am (p. 37) aware of is the request by practicing members of the Sikh religion, for instance, to wear a beard, to wear a turban and so forth.

Q. Sikh? That is S-I-K-H?

A. That is correct.

Q. Are there any members of the Sikh religion, to your knowledge, in the Air Force?

A. Not to my knowledge.

Q. Have you ever heard of any members of the Sikh religion, to your knowledge, in the Air Force?

A. Not to my knowledge.

Q. Have you ever heard of any members of the Sikh religion being in the Air Force?

A. I have not learned it for a fact. It has been told to me that they are, but I do not know for a fact that they are.

Q. Are you familiar with the fact that the United States Army did for a substantial period of time permit members of the Sikh religion . . .

A. I am.

Q. . . . to wear a beard?

A. And also . . .

Q. And that the Air Force—or that the Army has recently repealed that exemption?

A. That is correct.

(p. 38) They rethought that proposition.

Q. I see.

A. And they decided to return to the standard essentially the same as our own.

Q. Do you know of any particular incidents in the Army's experience that has shown that applying that exemption has caused specific breaches of discipline or has undermined esprit de corps in any way?

A. I think you would have to talk to somebody from the Army. I am not familiar with that. I cannot speak for the Army in that regard.

Q. Well, you would agree, would you not, that personal tastes not based on religion can be distinguished from religious obligations or religious compulsions of some kind that someone feels?

A. No, I do not.

Q. You do not believe so?

A. No.

Q. You do not believe they can be distinguished?

A. Because you will find and I think you will probably hear of it later this morning about a survey that we did, that our chaplains did.

And in that, at least—I know I was surprised at all of the sects and denominations and so forth, the number—and some of them, I guess, to some people might be almost personal (p. 39) taste.

But I think human nature, being what it is, some people would be prone to say, "Well, this is really a matter of personal taste. I have my own personal religion. And I believe in it very strongly. And, therefore, my personal religion requires that I wear or do something that would be a departure from the uniform standards."

And I think we have to be able to deal with such a situation like that.

Let us say we do not make any exceptions under the regulations for—even though Orthodox Judaism is well recognized around the world, but there are sects that are much smaller and can even get down to one person.

Q. The Air Force does provide religious services, religious advisors for its personnel?

A. It does.

Q. And in that regard, it has chaplains?

A. It does.

Q. And provides religious services?

A. It does.

Q. At Air Force bases?

A. That is correct.

Q. Would you agree with me that that is a recognition of the fact that religion is distinguishable from just simply matters of personal taste?

(p. 40) A. No, again, I would not because, again, you know, we are constrained as to the number of resources that we have. I am sure that there are some sects or denominations that are, in fact, not represented in the United States Air Force Chaplains' Corps because there probably would not be enough individuals in the total Air Force to merit having chaplains in that denomination.

But I do not—so I do not agree with you that that necessarily is a conclusive criterion for deciding what is,

you know, a religious belief and what is not—what is a legitimate religious belief and what is not.

Q. Well, I am not asking you the difference between a legitimate religious belief and a non-legitimate religious belief.

I am asking you whether you would agree with me that the Air Force, indeed the United States, does recognize that religion or religious obligations are different simply for matters such as personal taste.

Indeed, it may be required to do so by the United States Constitution, but that is a matter for His Honor.

But I am asking you whether it is not a fact that the Air Force by providing religious services and religious chaplains recognizes that religion is a different status or different category from simply matters of personal taste.

A. Yes, I think under the way you put it there, I think, (p. 41) yes, we recognize that religion is something more than a matter of personal taste.

The point I am trying to make is that, in fact, trying to distinguish between personal taste and what I might consider personal taste; and to the individual that I am talking to, it might be a deeply-held religious belief; and we would be at an impasse, I guess, in deciding who was right.

So, hence, our regulation is formulated on the basis that we do not make exceptions for any belief.

Q. Do you think that it is important for the Air Force to teach its personnel as well respect for American traditions, such as freedom of religion?

A. Certainly.

Q. And if, in fact—and you would agree with me that the providing of the religious services educates Air Force personnel on the fact that there are within this country different religious faiths and people who are adherents to different religious beliefs?

A. Well, it does by example.

Well, of course, any individual's participation in any of the religious services is totally voluntary.

Q. I understand that.

A. That is not a requirement.

Q. But it is a part of Air Force tradition to demonstrate to its personnel that diversity of religious beliefs is (p. 42) tolerated?

A. By all means.

In our social assets dedication program, we point that out. We do the same thing for various ethnic groups and so forth.

Q. And, nonetheless, it is your testimony that if Air Force personnel were told that an individual wears a small skullcap because he is a member of the Orthodox Jewish faith, that would undermine discipline rather than foster respect for diversity of religious belief?

A. Yes, I believe it would run the risk of undermining discipline. It is not generally associated with Orthodox Judaism.

It is the fact that we are making an exception for one religion or for one, you know, it could be for one organization and it may not be a religious organization.

But if you make those kinds of exceptions, then you begin to erode the standards which you have accepted.

Because then other religious sects would be able to come to us and say, "how about us?"

And we would have to say, I would think, out of fairness, if we believed that your premise is a deeply-held belief and so forth, that I think we would have to accommodate that.

Q. And is that . . .

A. And I feel that if you go on, pretty soon we do not (p. 43) have a uniform service. We have people that are wearing all different kinds of things.

And I think then the purpose that we serve by being a uniform service with missions and goals and so forth are no longer served to the degree that they could otherwise be.

Q. As the Air Force's Director of Personnel Planning, could you tell us, General Usher, what the maximum number of people in the Air Force in your estimation are today who have some religious belief that would affect the clothing that they wear in violation of Air Force dress code?

A. No, I do not.

Q. Do you have any idea?

A. No, I do not because, you know, you are asking me an unknown unknown.

I think until some of those people came forward—I think we have done a survey as to what the various re-

ligious sects practiced in the country and so forth ask their members to do with regard to dress.

Now, which of those might choose to come forward, which would choose not—I just do not know. I mean you are asking me to speculate about something I have no way of giving you any useful answer.

Q. The numbers could be counted on the fingers of one hand? You do not know?

A. No, I doubt that it could be limited to that.

(p. 44) Q. On what basis? On what basis do you doubt that?

A. Well, just because the survey showed we are talking about 60 to 100 or so sects; we are talking about, oh, perhaps—I am not sure I can recall the figures accurately; but there are a dozen or so specific dress requirements. And I would expect some percentage of those to come forward, and I would expect that some percentage—they represent some percentage of the Air Force who are adherents to that sect.

Q. So your conclusions in that regard are based on that survey that Chaplain Reeves, is it, will testify about?

A. That is right.

That is one of the inputs that has to do . . .

Q. Are there any other bases for that conclusion that there will be other people who will come forward in substantial numbers and . . .

A. Well, as I understand it from the Army, in the case of the Sikhs, there were at least, I think, 12 or 15,

perhaps a little more than the fingers of one hand. That is correct.

Q. That there were 12 or 15 at one time?

A. That is correct, that is what I understand.

Q. And where did you get that information?

A. I just got that information from—some information that was passed to me by a member of my staff. That is all.

Q. And is it your testimony that granting exemptions, whether they be for a skullcap or a beard for religious reasons, (p. 45) would prevent the Air Force from defending the nation against its enemies.

A. I am not saying that it prevents the Air Force from defending the nation against its enemies.

What I am saying is that . . .

Q. I do not think you have to repeat your testimony. I am just asking you in terms of the conclusion.

A. My conclusion is that you do not do as effective job at it . . .

Q. I see.

A. . . . By allowing an erosion of the standards that you set.

Q. It is somewhat less effective?

A. That is correct.

Q. But just to go back just to one point, you have agreed, I think, that there have been instances in our past where American fighting forces did very well even with

totally diverse uniforms without even limited to religious exemption?

A. But in a situation that is not very relevant to fighting warfare in the modern context.

Q. Well, would it surprise you to learn that George Washington himself agreed that it would be an effective fighting force simply to wear Indian outfits?

A. That would not surprise me.

Q. It would not surprise you.

(p. 46) So it is . . .

A. Again, I say the context is considerably different than in a modern-day situation where we have a peacetime armed forces in the United States of over 2.2 million, which is, of course, as I think if my memory serves me correctly, more than the entire population of the United States at that time.

Q. How many people are there in the Air Force? What is the total number?

A. Approximately 560,000 people.

Q. There have been personnel in the Air Force who have worn a yarmulke. Is that right? Captain Goldman and I think someone else is mentioned in your answers to interrogatories.

A. There may be others, yes.

Q. Do you know of any incident where that in some way led to a breakdown of morale or discipline?

A. I do not think that is the point I am making.

The point that I am making is that if you allow this example to stand up, you then begin to have to allow other examples.

Or, you get into the situation where people point out to you, "There is somebody violating the regulation. Why do I have to adhere to that regulation or to another regulation?"

Q. It is undisputed, and the government has conceded, that for three and a half years Captain Goldman wore his (p. 47) yarmulke at March Air Force Base.

And I ask you, General Usher, whether during that three and a half year period were you here at the Pentagon?

A. I was here part of the time.

Q. Were you in your present position?

A. Part of the time, yes.

Q. Would you, in that position—did you, in that position, at any time hear of a single individual who had requested, based on Captain Goldman's wearing his yarmulke, permission to wear some religiously-motivated garb?

A. No, I did not have an occasion before me during that period of time.

Q. And, to your knowledge, did any case come before anyone else in the Pentagon based on his wearing his yarmulke for three and half years?

A. I cannot speak for the chaplains. They may have, but not to my particular knowledge.

Again, my point is that we have people who do not follow our regulations. That does not legitimatize what

they do just simply because they did not adhere to the regulation for a period of time.

I think that we feel as soon as we discover a situation, we need to correct it. And I think that is what I hope and that is what was attempted to be done here.

Q. But you were not consulted before Captain Goldman (p. 48) was told to remove the yarmulke?

A. No, I was not consulted. I became aware, I think, of the case in the May time period or so and knew that he had been directed to do it. But I did not get involved in that decision at all.

Q. And did you know that prior to that time, he had been permitted to wear his yarmulke? Were you consulted in that regard?

A. No, I was not.

[Messrs. Lewin and Butler confer.]

BY MR. LEWIN:

Q. You are familiar, General Usher, are you not, with the related issue as to whether the wearing of the beard is a violation of the Air Force dress code?

A. I am.

Q. And were you familiar with the litigation which took place in this court with regard to two chaplains who litigated, Jewish chaplains who litigated the question of whether they would be permitted to wear a beard?

A. I am familiar with it in the general sense of the word, yes.

Q. Were you familiar with it at the time of the litigation?

A. In part, yes. Again, in a personal way, no.

Q. At those times as well, the very same kinds of (p. 49) predictions that you are making now were made with regard to the wearing of the beard, were they not, by the Air Force?

A. I think they were. I read some of the affidavits that were referenced, and there were similar arguments made, yes.

Q. That there would be no way to draw the line?

A. Yes.

Q. And that there would be other people that would wear other religiously-motivated garments?

A. Uh-huh.

Q. In fact, the two chaplains, Rabbi Geller and Rabbi Kalinsky, were ultimately permitted after litigation to wear their beards. Is that correct?

A. That was part of the consequence of litigation.

Q. Have you heard either personally or second-hand of any deleterious consequences to the Air Force as a result of those chaplains wearing beards?

A. No, I have not.

THE COURT: Of course, the Air Force has a ready answer when somebody asks why. They put the blame or the responsibility on the court because that is where the Air Force has left it. Is not that your position?

THE WITNESS: That is correct.

THE COURT: "If the court says so, we cannot do anything about it. Our position has not changed."

(p. 50) THE WITNESS: Our position has not changed and will not change.

BY MR. LEWIN:

Q. Well, of course, in the second case, General Usher, if you are familiar with it, the Kalinsky case, there was not a court order, was there?

A. I just—I really do not recall at this point in time.

Q. Well, if I can just refresh . . .

THE COURT: Has that case been terminated, counsel?

MR. LEWIN: That case was terminated by the Air Force agreeing that it would permit Rabbi Kalinsky to wear his beard prior to any court determination; so the case is mooted out.

THE WITNESS: That is correct. I recall that.

BY MR. LEWIN:

Q. You recall that.

So it was not really under court order that the Air Force . . .

A. No, it was based on the precedent that had been established in the Geller case in order that we could sustain our position in the Kalinsky case, if I recall correctly.

And, therefore, I think the judge is correct in this case that we have not changed our position as to the desirability of that; and, furthermore, of course, as you know, these two are in the reserve forces. They are not like this current case in that they . . .

(p. 51) Q. Pardon? I am sorry. I did not hear that.

A. I say these people went on to an inactive reserve status, as I recall, the Kalinsky and Geller situations.

Again, my recollection of the details is somewhat hazy.

THE COURT: Well, as a policy matter, you decided to lose the battle and win the war.

THE WITNESS: I think that is fair.

THE COURT: Yes.

BY MR. LEWIN:

Q. But with regard to the consequences, though, you would agree with me that there were no harmful consequences to the Air Force that grew out of the fact that Rabbi Geller and Rabbi Kalinsky wore their beards?

A. That is not to my knowledge.

Q. That is not to your knowledge.

A. I cannot comment on what the morale and discipline of the units with which they were associated is today.

I have not asked them; and, indeed, nobody has reported to me.

Q. Nobody has initiated any report to you to complain about the morale . . .

A. No, they have not.

Q. . . . or discipline of that unit?

A. No, but again I think the point holds that there is (p. 52) that ready explanation that we ended up in court on their matters.

MR. LEWIN: One moment, Your Honor?

THE COURT: Surely.

[Messrs. Lewin and Butler confer.]

MR. LEWIN: That is all, Your Honor.

THE COURT: Do you have any redirect, Mr. Lawrence?

MR. LAWRENCE: We have no redirect, Your Honor.

May General Usher be excused?

THE COURT: You certainly may be excused, General. You may step down and be excused.

[The witness leaves the stand.]

THE COURT: I think it might be appropriate for us to take a short recess at this point. We will resume at 11:00 o'clock.

[Thereupon, the court recessed at 10:50 A.M.]

[Following the mid-morning recess, the court reconvened at 11:06 A.M.]

MR. LAWRENCE: The defendants call Chaplain Reeves to the stand.

Thereupon,

Capt. Donald L. Reeves, Chaplain, USAF, called as a witness by the defendants, after first being duly sworn, was examined and testified as follows

Direct Examination

BY MR. LAWRENCE:

(p. 53) Q. Chaplain Reeves, would you please state your full name for the record.

A. Donald L. Reeves.

Q. What is your current grade?

A. Grade is 03—Captain.

Q. Would you please briefly describe your educational background, Captain Reeves.

A. Okay.

I have a B.A. in English, double major, English and Bible, from Bethel College in Tennessee; a Master of Divinity Degree from Vanderbilt Divinity School with graduate work in Management, Vanderbilt Graduate School of Management.

Q. What are your postgraduate degrees?

A. Just the Master's of Divinity Degree.

Q. What is your professional background, Chaplain Reeves?

A. I have been a pastor, teacher, and a writer.

Q. Would you give us briefly what period of time you were a teacher.

A. I was a teacher for two years, one year 1963—'62 to '63 — I taught senior English at Mount Juliet High School out of Nashville, Tennessee.

And in '67-'68, I taught senior English at Sparta High County High School in Tennessee.

Q. And?

A. I taught two summers at Peabody College, Administration (p. 54) High School.

Q. What did you teach at Peabody High School?

A. I taught senior English.

Q. And after you completed that aspect of your professional career, what came next?

A. Well, I am a pastor or was a pastor. I was on the staff as an associate pastor of the First Presbyterian Church in Nashville, Tennessee.

And I moved from there to senior pastor of a church in Jackson, Tennessee.

I was a psychiatric chaplain for the Tennessee Department of Mental Health for two years and then was a presbyterial executive for the presbytery of Murfreesboro, Cumberland Presbyterian Church.

Q. You indicated, I believe, that you considered yourself a writer. Have you had any publications?

A. Yes.

Q. Could you describe some of your publications for us.

A. I have had a feature article for the *Nashville Tennessean;* I have written curriculum material for adults, teenagers, and children for United Methodist Publishing House; and I currently have a column in my denominational magazine and have written articles for them down through the years.

Q. Going back to your articles briefly, what was your article in the *Nashville Tennessean*?

(p. 55) A. It was on the intimidating atmosphere of the average courtroom.

THE COURT: Do you want to revise it now that you know. . .

THE WITNESS: No, not yet.

And the discouraging effect that has on the average citizen trying to exercise his legal rights.

BY MR. LAWRENCE:

Q. What was the nature of your publications for the United Methodist Publishing House?

A. Adult curriculum materials on the use of silence in *The Adult Leader,* which is for teachers and adults; and then full spectrum of material for children and some summer programs for working with youth.

Q. What is your feature column that you write?

A. It is entitled "Letter to the Lord." It is often a very satirical column in which the kind of human aspects of life is lifted up in a satirical way as a letter to God.

Q. Where are you currently assigned, Chaplain Reeves?

A. Maxwell Air Force Base, and I am with the Chaplain's Resource Board, which works for the Chief of Chaplains.

Q. What are your responsibilities in your current position?

A. I am a resource person in the area of pastoral care and also in the area of theology for ministry.

(p. 56) And I also am one of the chief writers for the board and researcher for the board. I edit the monthly newsletter for the chief of chaplains, which is his official publication.

Q. In your current position, have you undertaken any research on the dress and appearance requirements of various religions or sects?

A. Yes, essentially the research that was done the 28th and 29th of August relative to the code of dress and uniform requirements.

Q. What form did the result of that research take?

A. It took the form of an outline that outlines the dress and uniform requirements for quite a diversity of groups, denominations, in the religious structure of the U. S.

MR. LAWRENCE: Would the clerk please mark this as defendants' exhibit 1 for identification.

MR. LAWRENCE: Let the record reflect I am providing a copy to plaintiff's counsel.

THE DEPUTY CLERK: Defendants' exhibit number 1 marked for identification.

[A document referred to was marked for identification as defendants' exhibit No. 1.]

MR. LAWRENCE: I have a separate copy for the court, for the convenience of the court.

[A copy of the exhibit is also handed to the court.]

(p. 57) MR. LAWRENCE: Your Honor, may I approach the witness?

THE COURT: Surely.

[Mr. Lawrence approaches the witness.]

BY MR. LAWRENCE:

Q. Chaplain Reeves, I show you what has been marked as Defendants' Exhibit 1 for identification and ask if you recognize that document.

[The exhibit is handed to the witness, who looks at it.]

THE WITNESS: Yes, sir.

BY MR. LAWRENCE:

Q. What is that document?

A. That is the compilation of the research that I did relative to the dress and uniform requirements.

Q. Chaplain Reeves, I would ask you to turn in defendants' exhibit 1 to the heading of "Indian Heritage Groups."

A. (Complying) Okay.

Q. What are the dress or appearance requirements for the International Society for Krishna Consciousness?

A. They are one of the groups that has the requirement of the maintaining of hair as it. They require a tuft

of hair, which is called a "Sikh," which is worn by the males.

They have clay markings which are distinctive, the most distinctive of which are two parallel white lines that run from the forehead down to the bridge of the nose.

(p. 58) Q. Further in that same category, "Indian Heritage Groups," what would be the dress or appearance requirement for the Satchidananda Ashram-Integral Yoga group?

A. The monks in that particular group of the "Indian Heritage" section would have to wear the saffron robe; other members simply wear white clothing.

I noted in research that I did that as to whether or not these are optional for military service, it is not listed. However, military service is allowed by the denominational standards.

Q. If you would turn in Defendants' Exhibit 1 to the "Islamic Groups," what would be the special dress requirements of the World Community of Islam?

A. (Complying) The males are not allowed to wear clothes that show the imprint of the body at all; the females show only the face, the hands, or below the ankles.

Q. Would the adherents of that religion be permitted to wear the current Air Force uniform?

A. I would presume not.

Q. If you would turn to the category of "Sikh" on Defendants' Exhibit 1, what are the dress and appearance requirements of the groups "Healthy, Happy, Holy" and "Sikh Dharma"?

A. (Complying) Okay.

Those are the same. Those who are practicing members of those groups must keep their hair, all of their hair, (p. 59) including their beards.

The hair is turban-tied on top of their heads. They have a very unusual requirement in that besides the special underclothing they wear, they also have a steel bracelet and a dagger.

The official clergy of that particular group wears jodhpur-like pants.

MR. LAWRENCE: Your Honor, I have nothing further of this witness.

I move the admission of Defendants' Exhibit 1 for identification into evidence.

MR. LEWIN: Your Honor, this is not an objection.

Obviously, this is not a jury trial, and I would like to cross-examine the witness on that document.

THE COURT: I will reserve ruling until you complete your cross-examination.

MR. LAWRENCE: Certainly.

MR. LEWIN: Thank you, Your Honor.

Cross-Examination

BY MR. LEWIN:

Q. Chaplain Reeves, in your education, did you take any courses in comparative religion?

A. Yes, sir.

Q. How extensive was that?

A. If I remember correctly, I had about nine semester (p. 60) hours, perhaps twelve; and I just frankly cannot remember the exact number. It has been a long time ago.

Q. Did those—did the subject matter in those courses cover any of the groups that are listed here under "Sikh Groups," for example, that you testified about?

A. (No response)

Q. Specifically, the "Healthy, Happy, Holy" organization?

A. I do not remember that it did, no.

Q. The International Society for Krishna Consciousness?

A. I remember some study of that. I could not tell you a detail.

Q. In your experience subsequent to your education, were you personally involved in any way in comparative religion study of any kind?

A. No, sir.

Q. You were essentially a pastor for the Presbyterian Church during that period of time that you were in the clergy following. . .

A. Yes, and the Psychiatric Hospital Chaplaincy.

Q. All right.

And this particular study, which is Defendants' Exhibit Number 1, you say was done August 28th and 29th of this year?

A. Yes, sir, that is a Friday and Saturday a couple of weeks ago.

Q. And that was done for purposes of this case. Is that (p. 61) right?

A. Yes, sir.

Q. And I notice on the front page of that, it says, "Contractor for this research was Kirschner Associates, Inc."

Who was Kirschner Associates, Inc.?

A. I have no idea.

They were listed as the contractor by the Army in the pamphlet, which was the basic guide that we used.

Q. I see.

So that is the contract before that, that pamphlet, No. 165-13?

A. That is my presumption.

The Army decided to do the study. As I understand the process, they contracted out certain portions of the study. Kirschner Associates had the sub-contract—or rather had the contract; and then even themselves sub-contracted some work out.

Q. But the particular information that appears on the succeeding pages was all information that you personally accumulated?

A. The particular information was within the posed pamphlet of the Army, with footnotes accordingly.

And I took that pamphlet as well as looking at the bibliography and put it in outline form, particularly related to dress and uniform codes.

(p. 62) Q. What made you select particular denominations or groups for that study?

A. They are the ones that are covered in the pamphlet.

Q. I notice the study begins with "Christian Heritage Groups."

A. Right.

Q. What are the heritage groups?

A. Evidently, the original contractor, when they did the study and perhaps in accordance with the Army's request—I am not sure about that—but, at least, the contractor and those who sub-contracted for the sake of order, divided their material of their concern into these groups.

They called them "Christian Heritage Groups"; and they would be, for instance, those groups that had in their heritage particular relationship with the Christian faith.

Q. Well, I notice that the study excludes, for example, your own, the Presbyterian Church.

A. That is right.

Q. And you have got no listing anyplace in these pages for the Presbyterians.

A. That is true. That is true.

Q. The study excludes the Roman Catholic Church, does it not?

A. That is true.

Q. It excludes all Baptist groups, does it not?

(p. 63) A. That is true.

Q. So, essentially, what you were doing in this study is simply taking a whole group of very small minority sects. Is that right?

A. I am not sure.

The Army are the ones who set up that, and we simply followed their lead. I am not sure what their purpose was for excluding the major mainline groups.

Q. But you would agree with me that the major mainline groups are excluded?

A. Yes, they are not—I do not think the intent was to even study them.

Q. And those major mainline groups are the major groups that are represented in the Air Force. Is that not right?

A. I would presume that. I do not have statistics to back that.

Q. Well, the work you do now is sort of with the Central Office of Chaplains for the Air Force?

A. That is right.

Q. And is it fair to say, then, that as, for example, the World Almanac indicates, that the largest churches in the United States are the Roman Catholic Church, the Baptist Church, the Lutheran Church, various Methodist Churches, Presbyterian Churches, the Episcopal Church—those churches are not in the study?

(p. 64) A. That is true.

And there are some minority churches that are not, too. Your Orthodox, your barest breakdowns—we have—in fact, I am a member of a very small Presbyterian body within the Presbyterian group.

So I would say that it was not an exclusion made simply on the basis of major or minor necessarily.

Q. I see.

But the major churches I have listed have no clothing requirement, nothing that would affect their dress or uniform in any way?

A. That is true.

Q. And would you say—do you have any idea, just in terms of approximation, as to the percentage of Air Force personnel that belong to the major churches that have no religious. . .

A. No, sir, I do not. I do not have any statistical idea.

Q. Would you agree with me that that is in excess of 90 percent?

A. I just have no idea.

Q. Well, would you have any reason for believing that it is any different in its general proportions than the population at large than those that belong to the population. . .

A. No, I could not. I would have no reason to.

Q. Now, with regard to the items that are on the chart, (p. 65) did you say you made inquiries yourself?

A. In terms of looking at printed material?

Q. Printed material.

A. I looked at all of the materials that are in the bibliography, which were listed in the bibliography of the Army pamphlet, in addition to a couple of resources that were not in it, which are on your bibliography.

On the bibliography that you have, there are two books I have not seen—one entitled *Dread,* by Joseph Owens, the other, *The Rastafarians*—simply because those were printing material that the original contract group utilized in getting their information about the Rastafarian group. And I was unable to find that.

The others I looked at.

Q. The. . .

A. I am sorry. There is one other one.

Q. Yes.

A. Okay.

I have not specifically looked at *The Jewish Catalogue.*

Q. You did not see *The Jewish Catalogue?*

A. That is right.

Q. Did you see the other book?

A. *We Jews,* yes.

Q. And could you describe that book?

(p. 66) THE REPORTER: What was that?

THE WITNESS: *We Jews,* by Efraim Rosenzweig.

THE WITNESS: This is a book that is a summary by a Rabbi, if I recollect, of the Jewish faith and has been, in fact—I think all of our Chaplains have this book. It has been utilized as a book of familiarization for the Chaplain force with the Jewish faith.

BY MR. LEWIN:

Q. I notice that book is not listed under either Conservative Judaism or Reform Jews in your other printed information.

A. That is true.

That book was not utilized by the study.

Q. Now, there is another column headed "Original Source of Information."

A. Yes, Sir.

Q. Did you talk to people. Is that what that is?

A. No, this, "The Original Source of Information" column, is a listing of the original sources for the contract group.

They themselves got their information on not simply the dress and uniform requirements, but total descriptions of these groups from individuals' agencies.

And they listed those within the Army study. There is an Appendix that has them listed. It even has names and addresses.

Q. And as I understand it, the study of religious (p. 67) requirements and practices is not limited to the dress or uniform.

A. Oh, no, not at all.

Q. Well, just directing your attention to the page which contains the Jewish groups, . . .

A. All right.

Q. . . . Did you, in regard to studying the Jewish groups, seek in any way to find authority beyond *The Jewish Catalogue* or the book by Rabbi Rosenzweig that you list there?

A. Or the pamphlet itself?

Q. Or the pamphlet itself?

A. No, sir, no.

Q. And on what basis did you determine that the materials that you relied on were really the authoritative sources for the information that you were including in your study?

A. The extensiveness of the Army study itself and what I feel to be the trustworthiness of that implies its correctness.

And then the other books were the ones most available to us at the moment.

Q. You say you have not seen *The Jewish Catalogue*?

A. I have seen it, but I have not looked at it.

Q. You have seen it?

A. Yes, sir.

Q. It is really sort of a pamphlet, is it not? It is (p. 68) a soft cover, kind of a large popular book?

A. Uh-huh.

Q. It is not—would you call it an authoritative description of the religious practices?

A. I am not sure. I do not know what the purpose of it is.

Q. Did you study Judaism at all in comparative religion courses that you took, or are you familiar with Jewish practices?

A. Yes, to some degree, but I think simply in the way that you study all other religions that you study when you are in a seminar program.

Q. But are you. . .

A. I am not extremely—I would not consider myself an expert on the Jewish faith at all.

Q. You know, though, that there are authoritative codes of Jewish law?

A. Yes, sir.

Q. And you did not look at those?

A. I have seen the Jewish—let us see—*The Concise Code Of Jewish Law,* I believe, by Appel. I have seen that and looked at that.

Q. That is not part of the study?

A. No, no, sir. I did not see that until after the study was over.

[Messrs. Lewin and Butler confer.]

(p. 69) BY MR. LEWIN:

Q. You said the study was based, you indicated in part, on *The Jewish Catalogue.*

[The book is shown to the witness.]

BY MR. LEWIN:

Q. Do you recognize that, *The Jewish Catalogue*?

MR. LEWIN: Let me mark it for identification.

[The book referred to was marked for identification as Plaintiff's Exhibit No. 3.]

THE WITNESS: I am sorry.

Let me make sure that I understand you. I did not use the Catalogue in the study.

BY MR. LEWIN:

Q. But you did see the Catalogue?

A. I have seen the Catalogue, yes. I saw it after the study was completed.

Q. Well, just showing you Plaintiff's Exhibit Number 3 for identification, . . .

[The exhibit is shown to the witness, who looks at it.]

BY MR. LEWIN:

Q. . . . Would you agree with me that that is sort of a popular summary of various kinds of Jewish practices, customs?

A. I would presume it to be so, looking at the publisher (p. 70) and the table of contents.

Q. Would you consider that an appropriate basis for a scholarly conclusion to be drawn regarding Jewish requirements of the Jewish faith?

A. I am not sure how to answer that. I would have to look at it, I think, in detail to make a decision on that.

Q. Let me show you what I would mark as Plaintiff's Exhibit 4 for identification.

[Another book referred to was marked for identification as Plaintiff's Exhibit No. 4.]

BY MR. LEWIN:

Q. This is a volume called *Code Of Jewish Law,* in English.

[The exhibit is handed to the witness, who looks at it.]

BY MR. LEWIN:

Q. Have you ever seen that?

A. Yes, sir, I—now, I presume that this is the one that I have seen.

Q. I do not believe it is.

A. It is not?

Q. No.

A. This is not *The Concise Code* by Appel. Okay. No, I have not seen this.

(p. 71) Q. Just from looking at it, does that appear to be a more detailed scholarly . . .

A. Certainly.

Q. . . . Exposition of Jewish law than what appears in Plaintiff's Exhibit 3 for identification?

A. Yes, I would presume that from taking a cursory look.

Q. Now, in studying Conservative Judaism, which is listed on that same page, did you have recourse to any scholarly works on Conservative Judaism?

A. No, sir, utilized the pamphlet on that.

Q. Well, let me show you what I will mark as Plaintiff's Exhibit 5 for identification.

[Another book referred to was marked for identification as Plaintiff's Exhibit No. 5.]

BY MR. LEWIN:

Q. This is a guide to what is called Jewish life?

[The exhibit is handed to the witness, who looks at it.]

BY MR. LEWIN:

Q. It is *Jewish Religious Practice—A Guide To Jewish Religious Practice,* by Rabbi Isaac Klein. Have you ever seen that document before?

A. No, sir.

Q. Just from the inside flyleaf, can you tell whether (p. 72) it is a survey of conservative Jewish practice?

A. I would presume that it is.

Q. And if I told you that in that Plaintiff's Exhibit 5 there is reference to practices of conservative Jews to wear a head covering at certain times when praying or when performing a ritual or when eating—specifically, I direct your attention to Pages 51 and 52 of that volume, bottom of 51 and top of 52.

A. (Looking for reference in book) All right.

Q. Is that right?

A. I'm sorry.

Repeat the question.

Q. Is there indication there or statement there by Rabbi Isaac Klein of the Jewish Theological Seminary that, in fact, Conservative Judaism does expect its adherents to cover their heads in for enumerated instances, including when performing a ritual or when eating?

A. Right.

MR. LEWIN: I would like to offer those pages of that volume in evidence, Your Honor.

We can mark that as Plaintiff's Exhibit 6 and offer that in evidence.

[Pages of Plaintiff's Exhibit No. 5 for identification were marked for identification as (p. 73) Plaintiff's Exhibit No. 6.]

THE COURT: Any objection, Mr. Lawrence?

MR. LAWRENCE: One brief moment, Your Honor?

THE COURT: Surely.

[Mr. Lawrence looks over the exhibit.]

MR. LAWRENCE: We have no objection.

THE COURT: All right.

It will be received.

[Plaintiff's Exhibit No. 6 for identification was received in evidence.]

BY MR. LEWIN:

Q. Would you agree with me, Chaplain Reeves, that this study is really a very—how shall I put it?—cursory kind of review of very selected religious denominations?

A. This study that the Army pamphlet did?

Q. Yes.

A. I cannot dispute that since I do not know the original process they went through.

Q. With regard to Conservative Judaism, it appears to be erroneous, does it not, when it says that there is no special dress uniform required?

A. Okay.

It is not in agreement with the statement that you have here. However, I am not sure whether—would you like for (p. 74) me to tell you where—how the Army pamphlet asked that question and how that came about?

Q. All right.

Please do.

A. In the Army pamphlet, each of the denominational groups was asked a series of specific questions, and there were proposed answers to that.

One of the questions was: "Are there specific requirements"—I am not quoting directing—but, "are there specific dress uniform requirements?"

The answer from the research they did, which was in this case, the original source being a member of the Rabbinical Assembly, was "none."

And I do not have any explanation of that, other than that is the—and that also, the "A" behind it, means that that is the final form of—that statement was approved by that member of the Rabbinical Assembly.

Q. So there was one person who was asked who was a member of the Rabbinical Assembly?

A. It listed that person. I am not sure whether there were others or not.

Q. Under Orthodox Judaism, your report says, "incomplete information."

A. That is right.

Q. Now, it says that "group worship is required."

(p. 75) Is that a special dress or uniform requirement?

A. You mean is special dress or uniform requirement made at worship?

Q. No, no.

I am asking you, as I understand your study was, to find out whether there was special dress or uniform requirements for each of the various faiths.

A. Right.

Q. You have a recitation under Orthodox Judaism, which continues for about twenty lines, . . .

A. Right.

Q. . . . Saying that group worship is "required."

"There are 'fixed times' for public worship, three times daily: Morning, afternoon, and evening."

A. Right.

Q. That is not a special dress or uniform requirement?

A. Right.

Simply when there was no information from Orthodox Judaism, I simply tried to point out what requirements there were relative to worship itself and the equipment necessary for it and the apparel for it.

Q. So that entire paragraph all deals with worship and not with any special dress or uniform requirements?

A. Simply, as I understand it, as it relates to worship, right.

(p. 76) Q. Indeed, on its face, that section with regard to Orthodox Judaism states that there is no requirement other than during worship that males wear—keep their heads covered.

A. Orthodox Judaism, the statement on Orthodox Judaism, did not answer the question in the Army Pamphlet regarding Dress and Uniform Codes one way or the other.

So it is just simply absent.

Q. You simply had no information?

A. I had no information about that.

Q. You had no information about that?

A. Right.

And this was gleaned from discussion of worship.

Q. With regard to these other groups, Chaplain Reeves, do you or does the underlying report have any in-

formation about whether there is any member whatever of any of the other groups in the Air Force?

A. I'm sorry. I do not understand your question.

Q. The other groups that are in your report, is there any information in the underlying Air Force Report as to whether there is any member of any of the other groups, apart from the Jewish group in the Air Force, in the military services?

A. Yes.

Q. First in the Air Force and then in the military.

Well, let us just go over it: The "International Christian Ministries," which is the first under "Christian (p. 77) Heritage Groups": They have no special dress requirements.

Do you know whether there are any . . .

A. I do not know. And that evidently is not the intent of the study, to determine who was or who was not.

Q. All right.

In fact, on the front page, the indication that you got is that there is none of those, even of those small groups, had any special dress or uniform requirement?

A. (No response)

Q. Is that right?

A. I do not understand your question.

Q. In fact, you found from your study, such as it was, that none of the . . .

A. Oh, you are talking about of the Berkeley Christian Coalition?

Q. Well, just down that entire first page.

A. (No response)

Q. None of them had any special dress requirements; so if they were in the Air Force, there would be no . . .

A. They would . . .

Q. . . . Requirements?

A. Except for the Holy Order of Mans. I would presume from the little information that was on them, there could be conflict there. But I do not know enough details. It is on the first page.

(p. 78) The others, no.

Q. And on the second page, there's none?

A. Right.

Q. And on the third page, the first one that you found is the Krishna group, the . . .

A. Yes.

Q. . . . Hare Krishna group?

A. That's true.

Q. And do you have knowledge of any member of the Hare Krishna group who is in the Air Force? Is there any Hare Krishna member in the Air Force?

A. I have no knowledge of that one way or the other.

Q. You are working at the Central Office for Air Force Chaplains? Is that what that is?

A. Well, I work at the Resource Board at Maxwell.

Q. Resource Board?

A. Right.

Q. And what is the Resource Board exactly?

A. It is a—it is simply what is says. It is a group of Chaplains who are resource people for the Chief of Chaplains in various areas, and we also do writing and research, not only relative to our areas, but to any other request.

Q. When you say "resource people," if there is a difficult problem of some kind, they would be likely to call upon you?

A. Yes, sir.

(p 79) Q. And would you consider it likely that if there were a Hare Krishna member someplace who made some religious request, that that would therefore come to your attention in the ordinary course?

A. It could and it could not.

We have not had that happen, and I really cannot answer from experience on that; and I have only been on the board since February, so I am not sure what the history is on that.

Q. Well, what has been—during your experience there, what has been the most unusual group that you have encountered in your experience?

A. You are talking about in my experience other than doing the research itself?

Q. Yes.

A. The only reference of a group that I have simply had mentioned is the Sikh group, who recently, I heard, asked for permission to pass out materials at a base event of some kind. But that is the only group that I have had any . . .

Q. It asked for permission to hand out materials? Now, this is a Sikh group of Air Force personnel, people who are in the Air Force?

A. The understanding that I had was it was an Air Force officer, in fact, who had asked . . .

Q. He was a member of the Sikh group and he had asked (p. 80) to hand out this material?

A. Or who asked for permission to use a—or to have a booth at some kind of event.

Q. Have you had any dress exception request from that member of the Sikh group?

A. No.

Q. Do you know of any . . .

A. Not that I know of, and I am not sure I would know.

Q. Do you know his name?

A. No, I do not. I don't have any idea.

Q. Where would that request have gone?

A. If it was a local request, it would have gone to the Base Commander.

Q. Do you know of any member of the Sannyas Order, S-A-N-N-Y-A-S, who is in the Air Force?

A. No, sir.

Q. Or any member of the Sri Chinmoy Centre?

A. No, sir.

Q. In fact, going through the rest of your study, leaving out for the time being the Jewish groups and the one member of the Sikhs whom you have described, do you know of anyone in the Air Force who is a member of any or adherent to any religious faith that requires some exception or variation from the Air Force dress code, according to your statement?

A. Not that I can think of, no, sir.

(p. 81) Q. Uh . . .

A. Let me say with the exception of the fact that we do have quite a few Mormons in what they are allowed to wear; but it is not an exception to the rule since they are undergarments.

Q. Well, now, what is the—what is the rule with regard to Mormons are permitted to wear?

A. The covenanted member of the Mormon faith has certain undergarments they can wear or, that is, garments that are worn under the uniform. They are allowed to do that. They are "temple garments," as they are called.

We have got quite a few Mormons, and I would just simply presume that they do wear theirs.

Q. Is that provided in AFR 35-10?

A. Not that I know of.

Q. So how has that exception been implemented?

A. I would presume that it is implemented by them in that it is not visible.

Q. AFR 35-10—are you familiar with AFR 35-10?

A. Generally, yes, sir.

Q. It is a fact, is it not, that AFR 35-10 also specifies undergarments as well as clothing that is worn outside?

A. Not that I am aware of.

Q. Well, let me show you paragraph 2-9 of AFR 35-10 and specifically sub-paragraph (F).

(p. 82) [The reference is shown to the witness to view.]

THE WITNESS: Yes, that speaks to the visibility.

BY MR. LEWIN:

Q. And it does specify that undergarments are to be a T-shirt . . .

A. . . . And undershorts.

Q. Now, you say Mormons are permitted to wear religious undergarments. And have you heard complaints from any enlisted personnel about the Mormons' wearing undergarments?

A. No, sir, and I do not know for a fact that any have. That is a presumption on my part.

Q. Do you think, Captain Reeves, that it is desirable that the Air Force promote recognition of diversity of religious faiths among its personnel?

A. (No response)

Q. In other words, that Air Force personnel know that we live in a country where there are various religious faiths?

A. I think we have accomplished that, yes, sir.

Q. Do you think that is a desirable objective in terms of what the Air Force should achieve with its personnel, should it not?

A. I am not sure—Excuse me—I think it is an assumed thing; and I am not sure that I think it would—I am not sure how to answer that really. I do not know that that is their major concern or should be their major desire.

(p. 83) But I would think it is very good that they allow pluralism.

Q. And do you think that pluralism is fostered by a recognition that other people have got religious observances and beliefs . . .

A. Yes, sure.

Q. . . . That the individual may not have; . . .

A. Yes.

Q. . . . That other people have got different religious observances and symbols?

A. Yes.

Q. And, specifically, do you think it is fostered by a recognition that other people may, for example, in the exercise of their religious belief wear some particular garment? They may wear a hat.

A. I would presume that that is one way of recognizing it.

Q. Do you think that interferes with military discipline if people respect that?

A. I do not have information to answer that on honestly. I am not sure.

I have not—I have not run into an occasion personally where there was an interference of any kind.

Q. Would you agree, Captain Reeves, that religious obligations or duties should be granted somewhat preferential (p. 84) treatment to simply personal—matters of personal taste?

MR. LAWRENCE: Your Honor, we have been patient.

I am going to object. This is significantly beyond the scope of the direct examination here.

MR. LEWIN: I am not going to go on with this at length, Your Honor, it just has to do with the testimony that was gotten from the first witness, and I am just . . .

THE COURT: Well, I do not think that Captain Reeves has been offered as any expert, and his personal opinion is not at all persuasive on this subject matter.

MR. LEWIN: I think he has. I think he has been offered as an expert because he made up a chart of the different religious faiths; and, certainly, in our view, . . .

THE COURT: Making up a chart does not make one an expert. He has testified within his experience. He has told us exactly what he did and where he got the information from.

They asked him to compile something that would make some sense out of a rather obtuse, abstruse area that they have had no major focus on. And the best he could do in the time that they gave him was to get that information and go through it and present it to us in outline form.

I would assume the defense would want to make the whole study available, the whole transcript.

MR. LAWRENCE: That is correct.

THE COURT: That is one of the things that was to (p. 85) be ascertained and what the Army had in mind when they commissioned it. They spent money on it; they had a contract.

They needed the contract to determine what it was the contractor said he was going to do for the Army. And it might give some indication as to what they expect to get out of it.

I am going to sustain the objection. I think you are too far afield.

BY MR. LEWIN:

Q. Chaplain Reeves, to your knowledge, has any military service done any study of the effects of permitting religious exemptions to dress codes on military discipline?

MR. LAWRENCE: Objection, Your Honor.

The same objection—it goes beyond the scope of direct examination.

MR. LEWIN: This might . . .

THE COURT: I am going to sustain it.

I have had it from the top man, and he does not know of any.

MR. LEWIN: Pardon?

THE COURT: He does not know of any.

MR. LEWIN: All right.

I just wanted to confirm that with this gentleman, who did go to the available resources.

THE COURT: No, I do not want to pull rank on the (p. 86) Captain; but when the General says there has not been any, that is enough.

[Messrs. Lewin and Butler Confer.]

MR. LEWIN: That is all.

MR. LAWRENCE: Your Honor, I have no further questions.

I would move the admission of Defendants' Exhibit Number 1 into evidence.

THE COURT: You may step down, Captain Reeves, and be excused, if you like.

THE WITNESS: Thank you, sir.

[The witness leaves the stand.]

THE COURT: What is your objection?

MR. LEWIN: Your Honor, I think I just simply raise the objections, and I guess they go to the weight of the report more than to its admissibility.

And, obviously, we think it is an inadequately-done job, but we cannot object to its being admitted.

THE COURT: Well, I am going to receive it over your objection.

[Defendants' Exhibit No. 1 for identification was received in evidence.]

MR. LAWRENCE: Your Honor, one final matter. The Air Force regulation at issue here is already a part of the (p. 87) record, and I have not offered it for that reason.

I have additional copies if they would be of any help.

THE COURT: I think it unnecessary to have additional copies. We have the record copy which is marked as your exhibit.

MR. LAWRENCE: Exhibit A, I believe, to the opposition to preliminary injunction.

THE COURT: It should be re-marked.

Why do not we have it re-marked for the purposes of this trial.

You can put an additional marker on it, I guess, which would be the easiest way to do it.

MR. LAWRENCE: That would be Defendants' Exhibit Number 2.

[The AFR referred to was re-marked for identification as Defendants' Exhibit No. 2 and received in evidence.]

MR. LAWRENCE: Your Honor, we have no further witnesses at this time, and the defense rests.

MR. BUTLER: Your Honor, maybe this might be an appropriate time to break for lunch. We have rebuttal witnesses that we would like to call.

We have been informed by the defendants that they will be . . .

(p. 88) THE COURT: I do not think that will be any problem.

Can we resume—what time have you told the witness you would be ready for him? Is 1:45 the time you . . .

MR. BUTLER: We can resume by 1:15 or 1:30, Your Honor.

THE COURT: Would you like to resume at 1:30 then?

MR. BUTLER: Yes, Your Honor.

MR. LAWRENCE: That is fine with us.

THE COURT: All right.

Let us resume at 1:30 then.

[Thereupon, the court recessed for lunch at 11:55 A.M.]

AFTERNOON SESSION

[1:47 P.M.]

MR. BUTLER: Good afternoon, Your Honor.

THE COURT: I apologize for keeping you waiting. I was delayed. I usually try not to waste busy lawyers' time.

You can proceed now.

MR. BUTLER: The plaintiff wishes to call as its first rebuttal witness Dr. Howard Rosman.

THE COURT: Very well.

Thereupon, Howard J. Rosman, M.D., called as a witness by the plaintiff, after first being duly sworn, was examined and testified as follows:

(p. 89) *Direct Examination*

BY MR. BUTLER:

Q. Dr. Rosman, would you please state your full name for the record.

A. Howard Joseph Rosman.

Q. Where do you live, Dr. Rosman?

A. 166S17 Seventy-Third Avenue, Flushing, New York.

Q. What is the nature of your current employment?

A. I am a pediatrician.

Q. How long have you been a pediatrician? How long have you specialized in that area of medicine?

A. Since 1971.

Q. Where did you attend medical school, Dr. Rosman?

A. New York University.

Q. And where did you perform your internship and your residency?

A. At Bellevue Hospital and NYU Medical Center.

Q. Both in New York?

A. Yes, they are adjoining.

Q. What was your next position after your residency?

A. I was on extended active duty in the Air Force.

Q. When did you begin your extended active duty with the Air Force?

A. July 1, 1974.

Q. Where were you assigned?

(p. 90) A. Pease Air Force Base, Portsmouth, New Hampshire.

Q. How long did you serve in the Air Force?

A. Two years.

Q. Did you serve in the Air Force as a doctor?

A. As a pediatrician, yes.

Q. I notice you are wearing a yarmulke, Dr. Rosman. Are you an Orthodox Jew?

A. I am.

Q. Have you always worn a yarmulke?

A. I have.

Q. Did you wear a yarmulke while you were attending medical school?

A. I did.

Q. Did you wear a yarmulke while you were in your internship and residency?

A. Yes.

Q. Did you wear a yarmulke when you reported for duty at Pease Air Force Base?

A. I did.

Q. When you first reported for duty at Pease Air Force Base wearing your yarmulke, did you receive any reaction or any comment from any of your superior officers?

A. The hospital administrator told me that I would not be permitted to wear the yarmulke while I was on active duty while in uniform.

(p. 91) Q. Who was the hospital administrator if you can remember?

A. Major Jonas.

THE REPORTER: Major who?

THE WITNESS: Jonas, J-O-N-A-S.

BY MR. BUTLER:

Q. What did you do when Major Jonas told you that you could not wear a yarmulke in uniform?

A. I told him then that it would go against my religious beliefs, and I would really like to work it out so that I would be able to wear the yarmulke while I was at the hospital on duty while in uniform.

Q. What did he say to you at that time?

MR. LAWRENCE: Objection, Your Honor.

We are getting into an awful lot of hearsay; and my objection is on the basis of hearsay.

THE COURT: I think I have to sustain it.

BY MR. BUTLER:

Q. What did you do after Major Jonas told you you could not wear your yarmulke while in uniform?

A. At that point in time, I requested—I formally requested to have a waiver of the regulation stating that I should not wear a yarmulke.

[Mr. Butler shows a document to Mr. Lawrence.]

BY MR. BUTLER:

(p. 92) Q. Dr. Rosman, I place before you what has been marked for identification as Plaintiff's Exhibit Number 7 and ask if you can identify that document.

[The Exhibit is handed to the witness, who looks at it.]

THE WITNESS: This is the waiver request that I sent in to my commanding officer.

[Mr. Butler shows another document to Mr. Lawrence.]

BY MR. BUTLER:

Q. In connection with your request for a waiver, did you consult with any other personnel at the Air Force Base?

A. I spoke with the Hospital Commander, Colonel Edmonds, and also with a Colonel Matthews, who was the Methodist Chaplain on base.

Q. Dr. Rosman, I place before you what has been marked for identification as Plaintiff's Exhibit 8 and ask if you can identify that document.

[The exhibit is handed to the witness, who looks at it.]

THE WITNESS: This is the letter that Colonel Edmonds wrote to the base commander recommending ap-

proval of my request for a waiver of the regulation prohibiting wearing the yarmulke.

BY MR. BUTLER:

Q. What was Colonel Edmonds' position at that time?

A. He was the Hospital Commander.

(p. 93) [Mr. Butler shows another document to Mr. Lawrence.]

BY MR. BUTLER:

Q. Did you receive any information or orders from your commander thereafter, after your request for an exemption and Colonel Edmonds' . . .

A. I spoke . . .

Q. . . . Endorsement of that request?

A. I spoke with Colonel Burpee on July 16th.

Colonel Burpee was the Base Commander.

And on, I think, July 22nd, I received a direct order from Colonel Burpee not to wear my yarmulke while performing my duties while in uniform.

Q. I place before you what has been marked for identification as Plaintiff's Exhibit Number 9 and ask if you can identify that.

[The exhibit is handed to the witness, who looks at it.]

THE WITNESS: This is the order that I received from Colonel Burpee.

BY MR. BUTLER:

Q. After you received . . .

MR. BUTLER: Excuse me.

May I move the admission of Plaintiff's Exhibits Numbers 7, 8, and 9?

MR. LAWRENCE: Your Honor, I would object again on (p. 94) the basis of hearsay.

Although those documents have been identified, they are still hearsay.

MR. BUTLER: With respect to Exhibit Number 7, Your Honor, it is a letter request and identified by the witness, submitted by the witness to the Air Force with his own signature on it.

These documents—perhaps I can ask the witness more questions as to whether he has . . .

BY MR. BUTLER:

Q. With respect to Plaintiff's Exhibit Number 8, Dr. Rosman, the letter of endorsement from Colonel Edmonds, were you given a copy of that document by Colonel Edmonds?

A. Yes, I was.

Q. Did you discuss that with Colonel Edmonds?

A. I did discuss it with Colonel Edmonds before he sent it to the Commander, Colonel Burpee.

Q. And with respect to Plaintiff's Exhibit Number 9, is that your signature on the bottom of the document?

A. Yes, it is.

Q. Were you asked to sign that document when you received it?

A. I was told I had to sign that document on the day that I received it.

MR. BUTLER: Your Honor, I submit that these are not (p. 95) hearsay; they are admissible; and I move for their admission.

THE COURT: I will reserve on 8 and 9. Number 7 will be received.

[Plaintiff's Exhibit No. 7 for identification was received in evidence.]

BY MR. BUTLER:

Q. Dr. Rosman, after you received the letter of denial, the notice of denial from Colonel Burpee, what did you do?

A. Major Jonas at that point in time introduced me to the Area Defense Counsel, who explained to me what would happen if I would not obey the order.

Part of what he told me was that I would be court-martialed and if found guilty, . . .

MR. LAWRENCE: Objection, Your Honor.

The objection again is to hearsay.

THE COURT: Your objection is overruled.

THE WITNESS: If I would be found guilty, I could lose my medical license.

BY MR. BUTLER:

Q. So what did you do after you received that information?

A. I spoke with my counsel at that time.

Q. Did you continue wearing your yarmulke?

A. Immediately, the day after I received the order, I (p. 96) did not wear the yarmulke.

Q. Just so we can put this in some kind of time frame, do you recall what day of the week it was that you received that information from the Area Defense Counsel and decided to take your yarmulke off?

THE COURT: One moment.

What is your proffer of this witness?

MR. BUTLER: Your Honor, defendants have sought to establish that the wearing of a yarmulke while in uniform would somehow interrupt or interfere with discipline, uniformity, esprit de corps in job performance generally.

I intend to establish through this witness that after this story would progress, after a period of time, he was permitted to wear his yarmulke again.

He did wear it for a period of two years in the Air Force at a hospital, a regional hospital at Pease Air Force Base.

He did so without any adverse effect, no consequences, criticism, questions being raised about it, or any other adverse effect.

MR. LAWRENCE: Your Honor, that testimony is essentially irrelevant here on the basis of a single incident.

We had testimony which came out previously which deals with the rules of general application, and the basis for our case was made on the basis of a rule for general application (p. 97) and its enforcement.

Perhaps single incidents of non-enforcement or different enforcement of the rules would be irrelevant to the presentation here. We object.

MR. BUTLER: Your Honor, I submit that the information is both—the evidence would be both probative and relevant.

The testimony that has taken place before the court deals with, I admit, the general policy.

Dr. Rosman is one example.

We will be presenting other evidence of other examples and evidences of people who continued to wear yarmulkes on their Air Force bases without any problems.

THE COURT: Well, I will receive the testimony, but I doubt that it can be relevant to what I have viewed to be the crucial issue.

But I will receive the testimony.

MR. BUTLER: Very well, Your Honor.

BY MR. BUTLER:

Q. Once again, Dr. Rosman, so we can put this in a time frame, what was—do you recall the day of the week that you . . .

A. It was a Wednesday.

Q. What did you do after you indicated you contacted counsel?

Who was the counsel at the time?

A. Mr. Lewin.

(p. 98) [Mr. Butler hands another document to Mr. Lawrence to view.]

BY MR. BUTLER:

Q. Dr. Rosman, I place before you what has been marked for identification as Plaintiff's Exhibit Number 10.

[The exhibit is handed to the witness, who looks at it.]

BY MR. BUTLER:

Q. Can you identify that document?

A. It is a copy of a letter that was sent to a Mr. David Johnson in the Office of General Counsel, Department of the Air Force, by Mr. Lewin on my behalf.

Q. Did you request that Mr. Lewin send that letter for you?

A. I did.

Q. Did you receive a copy of that letter at or around the time that it was sent?

A. Yes, I did.

MR. BUTLER: Your Honor, I move for the admission of Plaintiff's Exhibit Number 10.

MR. LAWRENCE: Your Honor, we make the same hearsay objection, that the statement is not made by the declarant, he is unavailable.

MR. LEWIN: Your Honor, I certainly do not wish to . . .

THE COURT: One moment.

(p. 99) MR. LEWIN: Certainly.

THE COURT: One lawyer at a time.

MR. LEWIN: Yes, sir.

MR. BUTLER: Your Honor, first, I am prepared for Mr. Lewin to authenticate the document if necessary.

THE COURT: I know you are.

MR. BUTLER: But, more importantly, the witness has testified that this letter was sent at his request, at his direction, and that he received a copy of the letter at the time.

THE COURT: I do not know that it is particularly relevant. That is my problem.

MR. BUTLER: The substance of this letter, I believe, addresses the very issues that are addressed in this lawsuit.

And the matters were considered at the time by the Air Force.

And in the instance of Dr. Rosman, the same kinds of issues were considered by the Air Force in the case of Dr. Goldman.

THE COURT: The issues that are considered by the Air Force at the time vis-a-vis Goldman or anybody else are not necessarily controlling as to the issues to be decided here as we tried to frame it.

Are you saying they are estopped . . .

MR. BUTLER: No, sir.

(p. 100) They are . . .

THE COURT: . . . From treating the plaintiff in this case, Goldman, any different than they treated Dr. Rosman?

MR. BUTLER: No, sir.

I am simply maintaining, as a matter of policy, the Air Force has considered this matter before and treated it differently than they did today.

THE COURT: Not at the highest level where they are trying to have the policy established.

There has been no—I think they would stipulate. The Air Force would stipulate that you could probably dredge up a significant number of people, 15 or 20, over the years who may have had ad hoc determinations made for them.

MR. BUTLER: The particular addressee of Plaintiff's Exhibit Number 10 is the Office of the General Counsel at the Pentagon.

Other recipients of the letter were the Deputy Assistant Secretary of the General Counsel.

THE COURT: I will reserve on this until I hear the testimony of Dr. Rosman.

MR. BUTLER: Very well.

MR. LAWRENCE: Your Honor, the relevancy objection runs through the whole gamut of the testimony, including the exhibits offered in support of it.

THE COURT: Yes, I understand that.

(p. 101) MR. LAWRENCE: Thank you, Your Honor.

BY MR. BUTLER:

Q. Thereafter, did you have, after the letter was sent in your behalf and at your request, did you have an

opportunity to meet again with Colonel Burpee concerning the question of your yarmulke?

A. I was told in Colonel Burpee's office the following Tuesday.

And at that point in time, Colonel Burpee told me that it would be permissible for me to wear my yarmulke while on active duty while wearing my uniform.

MR. LAWRENCE: For the record, we object and ask that the hearsay testimony be stricken.

THE COURT: For the record, your objection is overruled.

BY MR. BUTLER:

Q. Approximately how many days went by then where you did not wear your yarmulke?

A. Three or four days.

Q. After your meeting with Colonel Burpee, did you commence wearing your yarmulke and continue wearing it for the full two years of your service?

A. Yes, I wore my yarmulke from that point on until I was discharged from extended active duty.

Q. Did Colonel Burpee impose any restrictions on where (p. 102) on base you could wear your yarmulke?

A. No.

Q. You were permitted to wear it everywhere?

A. That's correct.

Q. Even wore it in the hospital?

A. Yes, I did.

Q. You wore it while you were treating patients?

A. Yes.

Q. And you wore it while you were working at the nursing center?

A. That's right.

Q. During that two-year period, did you receive any inquiries or comments from your patients concerning your wearing of the yarmulke?

A. Occasionally.

As a pediatrician treating children who had never seen the yarmulke before, they would ask me what it was.

Occasionally, their parents would tell them that it was my religious belief to have my head covered.

And if the parents would not, then I would tell them that it was my religious belief to have my head covered in deference to God.

Q. Did any of the enlisted men on base question you about wearing the yarmulke?

A. No.

(p. 103) Q. Did you receive any indication that the yarmulke in any way interfered with your ability to perform your duties as a pediatrician?

A. No.

Q. Once you were permitted to wear your yarmulke for that period of time, did you have any indication that any kind of discipline problems developed at Pease Air Force Base as a result of your wearing the yarmulke?

A. No.

MR. BUTLER: I have nothing further, Your Honor.

THE COURT: All right.

THE COURT: Mr. Lawrence?

MR. LAWRENCE: Your Honor, I have no questions of this witness.

Again I move that his testimony be stricken as irrelevant.

THE COURT: I will take that motion under advisement.

THE COURT: You may step down, Dr. Rosman.

[The witness leaves the stand.]

MR. LEWIN: Your Honor, the plaintiff will call Dr. Samuel Levinson.

* * *

(p. 105) *Direct Examination*

BY MR. LEWIN:

Q. Dr. Levinson, would you please state your full name and address.

A. Samuel Levinson, 12207 Devilwood Drive, Potomac, Maryland.

Q. And, Dr. Levinson, what is your occupation?

A. I am a clinical psychologist.

Q. Are you self-employed?

A. At the moment, yes; at the time, yes.

Q. Dr. Levinson, could you please briefly summarize your formal education from college on.

A. I got my undergraduate degree in Emporia, Kansas, in 1951; came aboard in the Air Force; got an Air Force-sponsored master's degree and a commission in '55 —I guess it was '55; and in '57, was assigned by the Air Force for a doctoral program at Denver; finally finished that doctorate at the University (p. 106) of London in '68.

Q. So you have a Ph.D. in psychology?

A. And the American Boards, which is a supplementary designation or equivalent to medical residency.

Q. So you have received Board certification as well?

A. Yes.

Q. Have you served with the United States Air Force?

A. Twenty-six years.

Q. And what was the final position that you held with the United States Air Force?

A. I was chief clinical psychologist.

Q. Could you speak up, please.

A. I was chief clinical psychologist to the Air Force surgeon.

Q. At what period of time were you chief clinical psychologist to the Air Force?

A. From '71 to '77, until I retired.

Q. And prior to that, had you held other positions in the field of psychology with the Air Force?

A. Yes.

Q. All right.

I place before you, Dr. Levinson, what has been marked as plaintiff's Exhibit Number 11 for identifcation, . . .

[The exhibit is handed to the witness, who looks at it.]

(p. 107) BY MR. LEWIN:

Q. . . . A copy of which I gave to government counsel before we resumed this afternoon.

Could you tell us what that is.

A. That is my resume.

Q. And it includes your various Board certifications and employment?

A. Yes.

Q. It also includes on the second page various consulting positions you have held?

A. Yes.

Q. Are you a member of professional organizations in the field of psychology?

A. I am.

Q. Specifically, the American Psychological Association?

A. Yes.

Q. And the Virginia Psychological Association?

A. Uh-huh.

Q. And you have received professional honors from the United States Air Force, commendations, medals, as indicated on page 2?

A. Yes.

Q. Have you also engaged in teaching or lecturing?

A. Yes.

Q. And that is reflected on plaintiff's Exhibit 11 for

(p. 108) identification?

A. Uh-huh.

Q. Is it?

A. Yes.

Q. And you have also given speeches and lectures in the field of psychology?

A. Yes, I have.

Q. All right.

MR. LEWIN: I would like to, first off, offer plaintiff's Exhibit 11 for identification into evidence.

MR. LAWRENCE: No objection.

THE COURT: It will be received.

[Plaintiff's Exhibit No. 11 for identification was received in evidence.]

MR. LEWIN: And at this time, on the basis of Dr. Levinson's testimony, also I would like to offer him as an expert in military psychology—military psychology.

THE COURT: Do you wish to voir dire?

MR. LAWRENCE: Your Honor, I will just reserve for cross-examination.

I will pick it up on cross.

THE COURT: Very well.

He will be accepted as an expert.

BY MR. LEWIN:

(p. 109) Q. Now, during what period of time were you chief clinical psychologist for the Air Force?

A. From '71 to '77.

Q. And prior to that, from—is it 1954 you had served as a psychologist in the Air Force. Is that right?

A. Prior to 1954, yes.

Yes, I served as a psychologist in the Air Force. The Air Force did not require a Ph.D. at that time.

Q. Now, I direct your attentions specifically, Dr. Levinson, to the question of Air Force uniform, the Air Force dress code.

A. Yes.

Q. Could you please tell the Court whether as an expert psychologist your view is that the wearing of a uniform is beneficial in some way to the military service?

A. There is no question about that.

Q. All right.

A. It is a means of identification and all things that come with it.

Q. And there has been testimony that it affects matters such as discipline, teamwork, motivation, esprit de

corps, and image of Air Force personnel to wear an Air Force uniform. Do you agree that those things are affected?

A. Certainly. Certainly.

Q. By the way, are you aware, as a psychologist, of any (p. 110) studies that the military has undertaken in this regard?

A. No.

Q. Uh . . .

A. Not to my knowledge, they have not.

They have assumed with great conviction these matters, but have not really tested them.

The Defense Department has bought millions of dollars of research and leadership in personnel matters of this kind, but have always taken the stance that this is the way it has always been and this is the way it is and this is the way it perhaps has to be.

And they have had ample opportunity to buy that research as well.

Q. Now, let me direct your attention to . . .

THE COURT: Well, let me ask this: . . .

THE WITNESS: Yes, sir.

THE COURT: . . . During the time that you were in your capacity, did you ever suggest to them that there was not any basis for the assumption they had made in that regard, that research was necessary in order to validate it?

THE WITNESS: The issue never came up.

And as a medic, the issue of uniforms, unless they became issues of litigation and I would be involved as an expert witness, did not come up.

The medics do not get involved in defining uniforms (p. 111) except as they related to life-support systems.

Now, the question of its impact on the psychology of personnel and on morale and my role as a psychologist responsible to counsel with youngsters with valid discipline problems, I would be familiar with it in that context.

BY MR. LEWIN:

Q. Now, Dr. Levinson, let me direct your attention to the question of exemptions or exceptions to the dress code.

In your experience and from your experience, do exemptions or exceptions to the dress code necessarily undermine the various beneficial factors I have enumerated and that you have agreed to with regard to military dress?

A. The common phrase, such as good order and discipline—the exceptions more often than not create a sense of being special, a sense of esprit de corps around limited exceptions, the black beret, the Air Force policemen wear now, the pilots that like to wander around in their flight suits—and you see them in the PX and in the officers' clubs wandering in.

You know, people look for something a little special that sets them aside; and in a positive way, this has kind of always worked.

Nobody has really made an issue of those things unless their unrigidity was such that they could not handle

the flexibility or unless they needed a weapon to go after somebody that had bugged them and they could not get them on a legitimate (p. 112) issue that they were concerned with.

Q. Well, directing your attention specifically to your own experience, do you know during your—those twenty-how many years?

A. Twenty-six.

Q. . . . twenty-six years in the Air Force, of exceptions to the military dress code, that there were instances when people did violate the military dress code?

A. Every day you would see people with yarmulkes in the PX.

Occasionally, we would see people walking around in their flight suits. We would see people in the hospital wearing their operating-room green.

Q. Well, let us take the operating room green. Is there a restriction with regard to—you are talking about the green smock that a doctor wears . . .

A. Yes.

Q. . . . In the operating room?

A. Yes.

That is not part of a hallway uniform. It is not part of a uniform that you wear in a clinic. That is for the operating room.

Q. And by regulations, limited to the operating room?

A. I think so.

Q. And, nonetheless, people would walk around outside (p. 113) the operating room . . .

A. Simply because it was convenient and they were more concerned about getting their job done than whether or not somebody wore greens or whites.

Q. Other exceptions—another exception you mentioned was pilots in flight suits.

How was that an exception . . .

A. All right.

Because you are not to wear . . .

Q. . . . or variation?

A. You are not to wear flight suits off the flight line.

But, you know, it is a badge of honor; and you would see them in the PX, at the officers' club, and around until it bothered somebody; and then it would probably be brought up.

There is another little bit: I noticed people wearing the "I Gave" or "We Gave" combined Federal campaign badge.

Q. You mean the little button, the little medal?

A. The little button, yes.

Q. And that is not permitted by the dress code?

A. To the best of my knowledge, no restriction prohibited it; except that it was not decreed as a formal part of the regulations.

But nobody came up with any issue about it.

People worked during the campaign; and if they cared (p. 114) to, or they wore it if they were assigned as a

project officer; and, therefore, if he wanted or needed to make a bit of it—and then it disappeared.

Q. Had there been items of dress or clothing that are now permitted by Air Force regulations which began as really a variation from that Air Force code?

A. Well, I would think of the baseball cap.

Q. Baseball caps are not permitted?

A. Well, they gave—the Navy gave President Reagan a baseball cap when he was on the aircraft carrier recently; and they had taken to wearing baseball caps as official uniform now on the flight lines.

But, initially, I do not think they were declared official uniform.

It just turned out that those who wore them found that they were more effective than what was uniform at the time, and then they have since become uniform, I suppose.

Q. As a psychologist with your years of experience in the Air Force, could you just describe for the Court how you view or whether there are any beneficial aspects to granting an exemption or an exception to variations from the dress code.

A. Well, I think in the context of a rigid system, when youngsters kind of feel that things are boxed in pretty tight, if there are things that demonstrate that there is indeed flexibility, is indeed compassion, or that changes can be made (p. 115) rationally, that things are not imposed in a rigid or, as the youngsters refer to it as, in a "chicken" fashion, then it gives some sense of humanness about it.

And you feel less a victim of the absolute, less a victim of rigidity, less necessary to oppose or to resist or to get into struggles with it.

Zumwalt demonstrated this with the beard issue in the Navy some years ago.

Q. Are you talking about Admiral Elmo Zumwalt?

A. Yes.

You know, I thought it was a rather brilliant psychological move to recognize that there were a lot of young people with natural opposition tendencies that could readily marshal around this and make a cause celebre and waste a great deal of time and money.

And if he could avoid the then need to develop and act out these oppositional needs on issues of importance, which he, in my view, did—the youngsters then went and had their beards—it did not have any significant negative effect on the Navy and he disarmed this struggle.

They had a place to do their thing.

Q. Is there, in your view, necessarily a negative impact on other personnel of the military service if there are variations or exceptions permitted, in other words?

Do others view that as a basis for resentment, (p. 116) envy, . . .

A. I think that depends . . .

Q. . . . or jealousy?

A. I think that depends on what it is.

If you get the feeling that someone else is a favorite child in the family and the daddy commander, then there would be some resentment for that.

But if it is an issue that relates to something and to somebody that carries respect, then you view it as a statement of humanness in the system.

Q. All right.

We have not to this point, Dr Levinson, discussed this in the context of religious demands or religious exemptions.

Do you think that exemptions from the dress code based on the religious need of an observer add anything to your analysis you provided heretofore?

A. No, I do not think variations, you know, as long as they are not gross, would contribute to, you know, good taste and they would contribute to the sense of humanness.

In the years I have observed, I have noticed no negative—I have had no negative experience, you know.

Q. All right.

Would the fact that a particular variation from the dress code based on religion affect other personnel's view of (p. 117) that variation in any way?

A. No, I think what they would do is treat it with respect and get a sense of the system is somewhat flexible and that the system does respect—does respect religion.

And that if they indeed wanted to modify their uniform in the same way, they could look into converting.

There was a non-religious issue, the concern among black troops with psuedofolliculitis.

Adolescent blacks tend to get ingrown hair. And it became a power struggle very often on a training base.

Q. Were there exemptions from the grooming requirements . . .

A. There were . . .

Q. . . . for medical reasons . . .

A. . . . exemptions.

Q. . . . and those who could not shave?

A. And I would often serve as ombudsman for youngsters whose administrative people would resent the fact that they went to the hospital and resented the hospital for giving them one.

They said, "you cannot do that"—an inappropriate power struggle.

Q. But once it was recognized that this was based on medical grounds, was that respected by fellow members of the service?

A. Then it ceased to be an issue.

(p. 118) Q. And with regard to religious variations, is it your view as a psychologist that the same would be true if exemptions were permitted for religious variations . . .

A. Yes.

Q. . . . from the dress code?

A. Yes.

Q. Would that in any way have any educational impact on Air Force personnel as well as with regard to our pluralistic society?

A. Yes, I think it would teach people that there is room for differences, differences that are not flaunted in

a negative or power-struggle kind of way, differences that have little or nothing to do with the mission at hand, you know.

Q. Did the name, Simcha Goldman, come across your desk at any time while you were in the Air Force?

A. I am responsible for Simcha Goldman in the Air Force.

Q. How are you responsible for Mr. Goldman—Dr. Goldman?

A. As chief psychologist, I recruited him for a doctoral training program.

Q. Did you meet him personally?

A. No, only on the phone through his credentials.

Q. Did you know at the time that you recruited him that he was of the Orthodox Jewish faith?

A. Yes.

(p. 119) Q. Are you yourself Orthodox Jewish?

A. I am Jewish, but not Orthodox.

Q. How did you know that he was Orthodox Jewish?

A. I asked him as a matter of, you know, being able to consider where we might get him training and where he might need to be assigned.

Q. Did you know he had previously been a Chaplain?

A. Yes.

Q. And were you aware of any religious observances that he had?

A. It never became a subject of conversation as though it would be a problem.

I knew he was a Chaplain in the Navy, had served in the Carolinas somewhere with a Navy jail, had done a good deal of counseling, and that part attracted me.

And I thought that given his rabbinical training, demonstrating that he could do the graduate work, and his pastoral counseling experience, that we were half-way home in having an experienced military officer functional in clinical psychology, compared to a youngster recruited fresh out of graduate school that would take a couple of years to train.

So I was quite anxious to get him once I found out that he could fit into the system.

Q. And did you know that his religious—certain religious requirements of his could be satisfied by being near a (p. 120) large metropolitan center?

A. I knew that that would be the case, and I did not make any promises to him; but I marked it in my own diary that if that were possible, I would do that.

However, I have known many Orthodox people over the years who manage their own observance in their own quiet way, you know, without asking for or particularly needing special assignments.

Q. After Dr. Goldman was assigned—were you involved in his being assigned to March Air Force Base?

A. Not directly.

At that time—by that time, I was on my way into retirement, and the assignments were being handled by Colonel Foley, my successor.

Q. But did you continue with Air Force past the time that he was assigned?

A. Yes, in a consultant capacity.

Q. And was th[illegible] any time after he was assigned to March Air Force Base that you heard anything derogatory about him?

A. No, and being here in Washington and being in touch with the hierarchy that I have dealt with all those years, they would not have resisted the effort to lay a problem at my door had one arisen that, you know, I had some responsibility for or at that time wanted to tease me about.

Q. So to your knowledge, there was no problem resulting (p. 121) from his religious observances at March Air Force Base?

A. No.

Q. And, specifically, directing your attention to the question of a commissioned officer in the Air Force wearing a yarmulke, a skullcap on his head at all times, in your view as an experienced Air Force psychologist, does that present any serious problem of any kind to discipline in the Air Force?

A. None whatsoever.

Q. In your view, if such a person were allowed to wear a yarmulke, would that present any serious problem of any kind to teamwork in the Air Force?

A. None whatsoever.

Q. Would that present any serious problem of any kind to motivation to himself or other persons in the Air Force?

A. It would contribute positively because it reflects less need for resistance to a system that demonstrates some flexibility.

Q. Would it present any problem of any kind to esprit de corps in the Air Force?

A. None whatsoever.

Q. Would it have any beneficial factors?

A. Well, yes, because it can accept certain differences; and the unit could still say, "we are brothers in this mission, and we are brothers that can be different in our own ways and (p. 122) yet the same as we zero in on this mission."

THE COURT: Do you make any distinction between enlisted personnel and commissioned officers?

THE WITNESS: I served in both capacities, no, no.

There may be times when officers or enlisted men might pout and say, "How come he gets to do this and I don't?"

And when I was Patient Squadron Commander, I got complaints about pseudo-folliculitis, like "How come he does not have to shave and I have to?"

And I said, "Go get the disease and you will not have to shave."

And, you know, that was somebody needing to pout.

But, for the most part, the teammates, the barracks mates, of the people that warranted or got any special consideration were able to look at that not as something that was flaunted or given as someone favored, a spoiled-

child kind of thing, but because "it was somehow necessary and appropriate for him and not necessarily for me."

And since it did not affect their pay, it did not affect their passes, it did not affect their opportunity for education or recreation or choice of job—you know, he did not get KP because he wore the yarmulke—it became simply a statement that the system does have some respect for pluralism and in some respect some flexibility.

I think it enhances the system.

(p. 123) There are always people who are locked in rather tight who are frightened by changes in the system because the same script was dragged out when Zumwalt went with the beards: "It is going to destroy good order and discipline, and we cannot have this kind of flexibility. We will have people with beards down to their ankles. What are we going to do? And it will destroy everything."

Nothing of significance happened.

The issue of hazing at the Military Academy: "We need this to separate the wheat from the chaff" and that kind of nonsense. "We make it tough here, and they learn to stand up for what we stand for."

There is no evidence that Academy graduates do any better under fire than non-Academy graduates or that the commissioned history of reserve officers is any more significant than enlisted men.

They are not gods and do not do the research to demonstrate the point.

BY MR. LEWIN:

Q. And let me ask you, finally, Dr. Levinson, with regard to the fifth of the five factors to which there has been testimony here: is the image of the Air Force or Air Force personnel, in your view as an Air Force psychologist for 26 years, affected deleteriously in any way by permitting an Orthodox Jewish member of the Air Force, whether commissioned officer (p. 124) or enlisted person, to wear a skullcap or the yarmulke?

A. Undoubtedly, it would reflect the acceptance of pluralism, of flexibility, of humanness in the system, of recognizing that there are reasonable differences that do not affect the mission and do not affect the tasks at hand, and that would reflect to others that there is some respect for their differences and it is okay to be somewhat different in this accessible context.

And religion is certainly one of the most accessible contexts in our culture.

Q. Thank you very much.

MR. LEWIN: No further questions.

Cross-Examination

BY MR. LAWRENCE:

Q. Dr. Levinson, are you aware that the current Navy policy has departed from the permissive wear of beards since. . .

A. Yes, I am, but is there any evidence that justifies changing that?

It is my view that that is a function of the conservative wave that has come along with the conservative politics of the Reagan administration.

Q. Do you have any empirical studies to support that determination?

A. No more than what the Navy has to offer or that you have studies to offer me.

(p. 125) In fact, I would be glad to hear them.

I do not think that they exist.

Q. I was just asking you if the opinion you just voiced on the change was supported by any . . .

A. The whole society has become more conservative . . .

Q. I know but my question is . . .

A. . . . And that is empirical.

Q. Excuse me.

My question is, had there been studies?

A. No.

Q. Okay.

Thank you.

Now, when you were serving in the Air Force both in the Surgeon General's office and while you were serving as a psychologist or any particular position in the Air Force, your responsibilities were as a psychologist. Is that not correct?

A. Or as a military officer?

Q. Surely.

A. I served as patient squadron commander, as librarian, as paymaster, as fire marshal, as . . .

Q. Were you ever a hospital commander?

A. No, only physicians were hospital commanders.

Q. Were you ever in command of any military unit?

A. You mean a fighting unit?

(p. 126) Q. Fighting unit.

A. Medics are not assigned as commanders of fighting units.

Q. You say you never had a . . .

A. I did fire a weapon twice in my 26 years. An airplane looked about this big (demonstrating) from my office.

Q. You never then served in any capacity dealing with command of a unit?

A. Oh, yes.

I was consultant.

Q. I mean as a commander.

A. I would also work with the squadron commanders, be on the front line, . . .

Q. Excuse me.

A. . . . As an observer.

I was close enough to know about the psychological stresses . . .

Q. I think my question . . .

A. . . . Of doing exact work.

Q. My question was . . .

THE COURT: One moment.

It is impossible for the court reporter to keep an accurate record of what is going on. It is impolite to cross-talk over each other. And it certainly makes it difficult for me to understand why we are here.

(p. 127) So let us simmer down. I am going to give everybody an opportunity. You have all day long to get on the record what should be gotten on the record, but we can only do it in an orderly fashion.

MR. LAWRENCE: Thank you, Your Honor.

THE COURT: Now, ask your questions and give Dr. Levinson an opportunity to respond.

BY MR. LAWRENCE:

Q. Dr. Levinson, did you ever serve while you were on active duty in the directorate of personnel plans for the Air Force?

A. I did not.

Q. Did you ever serve in the office of deputy chief of staff for manpower and personnel?

A. I did not.

Q. When you were at an air base, while you were not in the Surgeon General's office at the Pentagon, did you ever serve in the central base personnel office at a particular installation?

A. I did not.

Q. You indicated during your testimony, I believe, Dr. Levinson, that you had observed instances of departures from regulations insofar as—and I think your example, one example, was the wearing of a flight suit in the PX?

A. Yes.

(p. 128) Q. And the wearing of operating room greens outside of the operating room?

A. Uh-huh.

Q. And . . .

A. And the yarmulkes in the PX.

Q. And the yarmulkes in the PX.

Did you ever undertake any comparative study about installations where the regulations were enforced and where those individuals received some sort of discipline if they departed from the uniform regulations in that particular regard?

A. I had neither the money nor the staff to do that.

But when I heard objections, I did make the suggestion to the Commander that perhaps we ought to look at this systematically.

Q. Did you—have you ever done any specific studies on—either while you were in the Air Force or since—on the wearing of the uniform?

A. No.

Q. Have you ever done any studies, comparative studies, on departures from a strict uniform policy?

A. No formal studies.

Q. Did you ever—have you ever done any research or undertake any studies dealing with the questions by comparison of morale, motivation, discipline, teamwork, image, esprit de corps as it compared to a post or installation (p. 129) where the uniform policy was maintained strictly compared with another place where the uniform policy was not completely enforced?

A. Only professional observations.

Q. Are you aware that there was congressional testimony during the aftermath of the difficulties on *The Kittyhawk,* testimony which gave indication that part of the problem stems from the lax nature of enforcement of uniform policy and its deleterious effect on the personnel serving of *The Kittyhawk*?

A. I am aware of the testimony, but I think there is a question about interpreting that and the inference that I think you are making here with it.

Q. Like what?

A. We do not know what else was going on at *The Kittyhawk* and whether the issues with morale and behavior were functions of uniform violations or whether they were violating the uniform as a passive aggressive way of saying, "You know, I have got to fight back in some way."

That is a manifestation of problems in leadership, I would think, on *The Kittyhawk,* not a function of whether or not they buttoned three buttons or four or wore some little bit here or there on the uniform as part of some identification, some identity issue.

Q. But there was testimony, was there not, that part of the impact was a result of lax enforcement of regulations?

(p. 130) A. Oh, generally.

MR. LEWIN: I object to the question.

THE COURT: Wait now one minute.

THE COURT: Dr. Levinson, what he is talking about is lax enforcement of regulations.

There is not any question that there was lax enforcement of all kinds of things on *The Kittyhawk,* from the bridge on down to the boilerroom.

THE COURT: All Dr. Levinson is saying is that you cannot focus that on uniform, whether there was violation of military uniform that gave rise to it.

MR. LAWRENCE: Your Honor, my point was simply directed to whether there was testimony at the inquiry on that point given as a factor.

THE COURT: You can find testimony on a given point all over the lot. He will concede that there was testimony on it—who gave it, why, where did it come from—that is irrelevant as far as I am concerned.

It is only relevant as testimony to somebody who really knows what he is talking about, testimony from somebody who has studied it, experienced it.

You can get anybody at one of these hearings to say anything. Witness what is going on right now on the Hill.

BY MR. LAWRENCE:

Q. Dr. Levinson, you gave an indication, I believe, (p. 131) in your direct testimony that in some instances exemptions to the uniform policy gave, depending on the circumstances, the impression that the person receiving the exemption was being treated as a favorite or favorite child under a given set of circumstances—a benefit to some but not to others.

A. It is always damaging in any organization or any family—any organization, which are extensions of families, psychodynamically.

It is always damaging if someone is given rights and privileges that they either do not deserve or that the others are not given, you know, in some non-objective kind of way.

We are not talking about that kind of thing.

Q. In your opinion then, would it be--would it have that negative effect if one group, let us say, the Orthodox Jews, were permitted to wear their religious garments or the yarmulke and another group, let us say, the Sikhs, were deprived of the wear of their religious garment?

A. I do not think so.

The Sikhs did make an issue. They had an issue some years ago in the Army in a basic training setting, I understand; and there was some compromise.

They were able to not have to cut their hair or something during basic training. That was allowed and the Army did not come apart.

(p. 132) Q. Well, do you . . .

A. But I do not know the details of that, but it did become a religious issue.

I do not think it had to be litigated. It was one of those things where the people who made—the regulation people and the legislative people took the responsibility of doing what they were supposed to do instead of having the courts being an agency of legislation.

Q. Well, I . . .

A. Things that reflect understanding, flexibility, compassion, that are not flaunted, that are not power struggles, put-down issues, you know, usually contribute positively to the function, to the morale and discipline of the organization.

It gives the commander more respect from the troops if they know that the commander is someone who can listen, who is not so tightly regulation bound as in the caricatures that we see in lots of movies and literature—people who are so inflexible that it is regulation imperialis.

It gives a sense of being able to approach the father figure, a sense of humanness; it is a positive sense of morality organization.

THE COURT: But, Dr. Levinson, you are not answering the question that was asked by Mr. Lawrence.

He asked you the question—he asked you specifically if, A, for religious reasons, is given the right to wear a (p. 133) certain garment or insignia or whatever, B makes the same request for his insignia, would it not create problems at least with morale and perhaps with discipline if you grant A's request and deny B's request. And we are assuming that both requests are honestly held by practicing members of a recognized religious group.

THE WITNESS: I would have to say yes.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1522

S. SIMCHA GOLDMAN,

Plaintiff,

v.

SECRETARY OF DEFENSE, *et al.*,

Defendants.

DEFENDANT'S RESPONSES TO PLAINTIFF'S REQUEST FOR ADMISSIONS

Pursuant to Rule 36, Fed. R. Civ. P., defendants, through counsel, hereby provide the following responses to plaintiff's request for admissions:

1. Plaintiff S. Simcha Goldman ("Goldman") is a member of the Orthodox Jewish faith.

ANSWER: Admitted.

2. Goldman is an ordained rabbi.

ANSWER: Admitted.

3. Goldman is a Captain in the United States Air Force, who has served on active duty at March Air Force Base ("March AFB") in Riverside, California, since September 1977.

ANSWER: Admitted.

4. Since September 1977, Goldman was assigned to the Mental Health Clinic of the Air Force Regional Hospital at March AFB, where he serves as a clinical psychologist.

ANSWER: Admitted.

5. It is a well-established religious tradition and practice among adherents to Orthodox Judaism that males keep their heads covered at all times.

ANSWER: Admitted.

6. In observance of the well-established religious tradition among adherents to Orthodox Judaism, Goldman wears a skull cap ("yarmulke") at all times.

ANSWER: Admitted.

7. Goldman has continuously worn a yarmulke since prior to his assignment to March AFB.

ANSWER: Admitted.

8. Since his assignment to March AFB in September 1977, Goldman has continuously worn a yarmulke, including while he is in military uniform, in accordance with his religious beliefs and practices.

ANSWER: Admitted.

9. For the period from September 1977 to May 7, 1981, during which Goldman wore his yarmulke while in uniform, Goldman's superior officers at March AFB raised no objection to his wearing a yarmulke while in uniform.

ANSWER: Admitted.

10. On or about May 8, 1981, Colonel Joseph Gregory, the Hospital Commander at March AFB, informed Goldman that wearing a yarmulke violated the Air Force's Dress Code Regulation ("AFR") 35-10.

ANSWER: Admitted.

11. On or about May 8, 1981, Colonel Gregory ordered Goldman to cease wearing a yarmulke indoors while in uniform at all places at March AFB, except that Goldman was specifically permitted to continue wearing his yarmulke while working and in uniform at the Regional Hospital located at March AFB.

ANSWER: Admitted.

12. On or about May 8, 1981, upon receiving Colonel Gregory's order concerning the wearing of a yarmulke while in uniform, Goldman informed Colonel Gregory that the wearing of a yarmulke was required by his Orthodox Jewish religious beliefs and practices and was a protected religious observance pursuant to the First Amendment of the United States Constitution.

ANSWER: Admitted.

13. On or about May 8, 1981, at the time of Colonel Gregory's order concerning the wearing of a yarmulke while in uniform, Goldman requested permission to continue his previously unchallenged practice of wearing a yarmulke at all times and in all places while in uniform at March AFB.

ANSWER: Admitted.

14. On or about May 8, 1981, at the time of Goldman's request for permission to continue wearing his yarmulke at all times and in all places while in uniform, despite the provisions of AFR 35-10, his request was denied.

ANSWER: Admitted.

15. Commencing on or about May 19, 1981, Goldman's counsel contacted the office of the Air Force Assistant

General Counsel for Personnel and Fiscal Affairs, explained Goldman's situation, and requested that the Air Force continue to permit Goldman to wear his yarmulke at all times as he had for the past three and one-half years.

ANSWER: Admitted.

16. The efforts of Goldman's counsel to secure an exemption for Goldman from the Air Force's interpretation of AFR 35-10 for purposes of his wearing a yarmulke while in uniform extended over a period of several weeks, but were not successful.

ANSWER: Admitted.

17. On or about June 23, 1981, Goldman was ordered by Colonel Gregory to cease wearing his yarmulke anywhere while in uniform at March AFB, including the Regional Hospital. Colonel Gregory informed Goldman that the wearing of a yarmulke while in uniform violated AFR 35-10.

ANSWER: Admitted.

18. On or about June 23, 1981, at the time of Colonel Gregory's order, Goldman explained to Colonel Gregory the nature of his religious observance and expressed his desire to continue wearing his yarmulke at all times, as required by his religious practice and beliefs.

ANSWER: Defendants admit that on or about June 23, 1981, at the time of Colonel Gregory's order, Goldman explained to Colonel Gregory the nature of his religious observance and expressed his desire to continue wearing his yarmulke at all times, but denies the wear of the yarmulke is required by his religious practice and beliefs.

19. On or about June 23, 1981, at the time of Colonel Gregory's order directing Goldman to remove his yarmulke while in uniform, Goldman requested permission from Colonel Gregory to appear for duty in civilian clothes, pursuant to an express exemption contained in AFR 35-10. Goldman's request was denied.

ANSWER: Defendants admit request no. 19, except deny that AFR 35-10 contains an express exemption which pertained to plaintiff's situation.

20. On or about June 24, 1981, Colonel Gregory issued a letter of reprimand to Goldman based upon Goldman's refusal to remove his yarmulke while in uniform in violation of Colonel Gregory's June 23, 1981 order, and in violation of defendants' interpretation of AFR 35-10.

ANSWER: Admitted.

21. Upon Goldman's failure to remove his yarmulke while in uniform, he was subject to immediate court-martial or other sanctions for violation of Colonel Gregory's June 23, 1981 order, and for violation of defendants' interpretation of AFR 35-10.

ANSWER: Admitted.

22. On or about June 24, 1981, following receipt of Colonel Gregory's letter of reprimand, Goldman submitted a written request to Colonel Gregory that formal processing of the letter of reprimand be delayed until June 29, 1981, the date upon which Goldman's military area defense counsel was scheduled to return to March AFB. Goldman's request was granted.

ANSWER: Admitted.

23. On or about June 25, 1981, Goldman was summoned to Colonel Gregory's office, and was informed by Colonel Gregory that, in light of Goldman's problems with the Air Force, resulting from his insistence upon wearing his yarmulke despite the provisions of AFR 35-10, Colonel Gregory had decided to withdraw a previously positive recommendation he had submitted in favor of Goldman's application for a one year extension of his service in the Air Force, and had, that day, submitted a negative recommendation on that application.

ANSWER: Admitted.

CHARLES F.C. RUFF
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

CRAIG R. LAWRENCE
Assistant United States Attorney

OF COUNSEL:
FRANCIS S. MORAN, JR., Major, USAF
General Litigation Division
Office of The Judge Advocate General
Washington, D.C. 20330

(p. 1) UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1522

S. SIMCHA GOLDMAN,

Plaintiff,

v.

SECRETARY OF DEFENSE, et al.,

Defendants.

Washington, D. C.
Thursday, August 6, 1981

Deposition of S. SIMCHA GOLDMAN, a witness of lawful age, taken on behalf of the defendant in the above-entitled action, wherein S. Simcha Goldman is the plaintiff and the Secretary of Defense, et al. are the defendants, pending in the United States District Court for the District of Columbia, pursuant to consent before Joyce Carr Mooney, a notary public in and for the District of Columbia, at the Conference Room, Second Floor, U.S. District Court for the District of Columbia, Third and Independence, Northwest, Washington, D. C. at 10:05 a.m., Thursday, August 6, 1981.

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(p. 2) APPEARANCES:

On behalf of the plaintiff:
Brownstein Zeidman and Schomer

By: David J. Butler, Esq.,
1025 Connecticut Avenue, N. W.
Washington, D. C.
and Robert Smith of the same firm and
Nathan Lewin, Esq.,
Miller, Cassidy, Larroca & Lewin
2555 M. Street, N. W.
Washington, D. C.

On behalf of the defendants:

By: Craig Lawrence, Esq.,
Assistant United States Attorney
and
Major Francis Moran, USAF
Captain Thomas Fiscus, USAF

PROCEEDINGS

Thereupon,

S. SIMCHA GOLDMAN

a witness of lawful age, was duly sworn by the notary public and, being examined by counsel, testified as follows:

Direct Examination

BY MR. BUTLER:

Q. Would you please state your full name for the record?

A. My name is S. Simcha Goldman.

Q. What is your home address?

A. 449 North Laurel Avenue, Los Angeles, California.

(p. 3) Q. Are you currently employed?

A. Yes, I am.

Q. Where are you currently employed?

A. I am a clinical psychologist with the United States Air Force Regional Hospital at March Air Force Base near Riverside, California. I am a Captain in the United States Air Force on active duty.

Q. How long have you been affiliated with the Air Force?

A. I've been on active duty since September 1, 1977.

Q. What are the nature of your responsibilities as a clinical psychologist at March Air Force Base?

A. I am responsible for psychological testing; I do psychotherapy; various kinds of mental health evaluations; training of enlisted personnel.

Q. Have those responsibilities changed significantly since the time that you commenced your service with the Air Force until today?

A. No.

Q. Captain Goldman, would you describe briefly your post high school education?

A. I graduated with a bachelor's degree in English literature from Yeshiva University of New York in 1967.

I also, while I was working for my bachelor's degree, took religious studies.

I completed the requirements for a master's of (p. 4) science in Jewish philosophy and rabbinic ordination from Yeshiva University in New York in 1970, and I also earned a master of arts degree in English literature from City College of New York in 1970.

I completed an M.A. and Ph.D. in clinical psychology from Loyola University of Chicago in 1977.

Q. What kind of an institution is Yeshiva University?

A. Yeshiva University is a rather diversified university. It offers undergraduate and graduate programs in a variety of secular studies, professional schools and also is a theological seminary.

Q. Did you receive a degree from the theological seminary of Yeshiva University?

A. Yes, I did.

Q. What degree was that?

A. A rabbinic ordination degree.

Q. When did you receive that degree?

A. I completed requirements in 1970.

Q. Are you affiliated with any particular branch of Judaism?

A. Yes, I am an Orthodox Jew.

Q. Have you always been an Orthodox Jew?

A. Yes.

Q. Did you grow up in an Orthodox Jewish home?

A. Yes, I did.

(p. 5) Q. Were your parents Orthodox Jews?

A. My parents are Orthodox Jews and my father is an Orthodox rabbi.

Q. Was your father a practicing rabbi?

A. Yes, he was for a number of years.

Q. He was a rabbi in a synagogue?

A. Yes, he was. Until I was about 11½ he was a practicing rabbi in a synagogue.

Q. In the observance of traditions, customs and laws of Orthodox Judaism, are there certain things that you do that are different than what other people might do?

A. Yes. I keep my head covered at all times; I eat only kosher food; I pray three times a day every day. There are numerous ways that I express my religious convictions every day.

Q. With respect to the covering of your head or the wearing of a skull cap or a yarmulke, is that something that you were also doing as a child, as you were growing up?

A. Yes.

Q. Is that something you continue to do, to wear your yarmulke while you attended college and graduate school and other—

A. Yes.

Q. —educational institutions?

Can you explain for us briefly your understanding (p. 6) of the significance or the purpose for wearing a yarmulke and why it is that you wear a yarmulke?

A. A yarmulke is an expression of respect for God. It's intended to keep the wearer aware of God's presence, and to therefore act in accordance with one's obligations to God.

For me, a yarmulke is also a sign of intellectual humility in that I submit my own intelligence to the higher intelligence of God.

Q. It is not necessarily the wearing of a yarmulke is it? It's the covering of your head that is—

A. That is correct. Any head covering would be suitable.

Q. You have worn your yarmulke, say, ever since you've been a teenager at all times?

A. Yes, that is correct.

Q. While you were in school, did you have any problems as a result of your having worn a yarmulke? People criticizing you or otherwise questioning the nature of the observance?

A. No.

Q. Once you completed your formal education process, would you tell us the progression of your employment?

A. After I completed my rabbinic degree and the two master's degrees, I immediately entered the United

States Navy on active duty as a chaplain between September of 1970 and August of 1972.

(p. 7) I then was the rabbi of a small congregation in Mt. Clemens, Michigan, and after one year, I then entered graduate school at Loyola of Chicago in September of 1973 through August of 1977. During that time I had some part-time involvement with the Jewish Children's Bureau as a rabbi.

Q. When you were with the Navy as a chaplain on active duty, did you wear a uniform?

A. Yes, I did.

Q. Did you wear your yarmulke while you were in uniform at times when you were not wearing another head covering?

A. Yes.

Q. Did you ever have any problems or questions raised as a result of your wearing a yarmulke at that time?

A. I had no problems wearing a yarmulke at that time. My first commanding officer at the Marine Corps Recruit Depot at Parris Island asked the senior chaplain about the yarmulke and the senior chaplain told me of the conversation and said that he had informed my commander that it was part of my religious observance, and my commander raised no objection.

Q. After you left the chaplaincy and you commenced service as a rabbi at a small congregation in—where was it? Michigan?

A. Mt. Clemens, Michigan.

Q. I take it you wore a yarmulke when you performed (p. 8) those duties as well?

A. Absolutely.

Q. And at all times other than when you were in the synagogue?

A. Absolutely.

Q. When you performed your counseling services at the Children's Bureau in Chicago, did you also wear your yarmulke?

A. Yes.

Q. Did you have any indication from any of your co-workers or other people with whom you were affiliated, either when you were in the Air Force or in any of your other jobs that your wearing of a yarmulke somehow interfered with the performance of your duties?

A. No.

Q. After you completed your Ph.D. and your work at the Jewish Children's Bureau—that was when? In August of '73?

A. August of '77.

Q. Is my understanding correct that you then proceeded to the Air Force?

A. Directly.

Q. Why were you interested in affiliating with the Air Force?

A. At the time that I made a decision to go to (p. 9) graduate school for clinical psychology, I needed some

funding, and I discovered that the Air Force had a scholarship program, and I decided to apply.

I had thoroughly enjoyed my two years of active duty with the Navy and I had found it a very rewarding and growthful experience coming right out of seminary, and I anticipated that going into the Air Force right out of graduate school would be very rewarding and enjoyable and a professionally growthful experience.

Q. Did you complete applications or other requests for affiliation with the Air Force?

A. Yes, I prepared an application, I would guess some time in 1972.

Q. What kinds of information were requested on that form, if you can recall?

A. I believe that it was some standard application forms that went into my employment background, my educational background; basically a standard application.

Q. Would it have included reference, for example, to your service in the Navy as a chaplain?

A. Yes. They did ask about prior military service and I listed that.

Q. Did you have a personal interview prior to your affiliation with the Air Force?

A. No, I did not have a personal interview.

(p. 10) Q. How did you find out where you were being assigned?

A. I called the Chief of Psychology at Wright-Patterson to discuss the assignment, and I also, in fact, went

out and visited him to discuss the assignment during the summer prior to my going on active duty.

Q. You met with him personally?

A. Yes.

Q. Did you wear your yarmulke when you met with him?

A. Yes, I did.

Q. Did he say anything to you at the time that you would have to stop wearing your yarmulke when you became affiliated with the Air Force?

A. No.

Q. At that time were you told that you'd be going to March Air Force Base?

A. Yes.

Q. Did you receive some formal notification that you should report to duty?

A. Yes, I did.

Q. Was it written or oral?

A. Yes, I received written orders.

Q. Can you recall when you reported to March Air Force Base?

A. Yes. September 7, 1977.

Q. At that time when you reported for duty at March (p. 11) Air Force Base, did you wear a yarmulke?

A. Yes.

Q. Did anyone say that you should take the yarmulke off?

A. No.

* * *

Q. At each stage in this inprocessing process, did you wear your yarmulke?

A. Yes.

Q. Did anyone say to you that you had to stop wearing it in the Air Force?

A. No.

Q. When did you finally get to the hospital?

A. Well, I showed up, I believe, that day and said (p. 12) hello to my supervisor, Major Frank Young. He was at that time the Chief of Psychiatry.

Q. When you met Major Young were you wearing a yarmulke?

A. Yes.

Q. Did Major Young say anything to you about the wearing of a yarmulke?

A. No.

Q. Were you given any formal package of materials that you should read with respect to regulations of the Air Force?

A. No, I wasn't. Some time within the first couple of months I was given a physician's orientation handbook, just about what is accepted terminology, and that sort of thing.

Q. Do you recall who the hospital commander was at that time?

A. Yes. Colonel Lawrence Smith.

Q. Did you have an opportunity to meet Colonel Smith?

A. Yes.

Q. Is that in and around September of 1977?

A. About. Some time during the first month I imagine I saw him.

Q. When you met Colonel Smith were you wearing a yarmulke?

A. Yes.

Q. Did Colonel Smith tell you you had to take that (p. 13) yarmulke off?

A. No.

Q. Did Colonel Smith indicate to you that there was any question whether or not you could wear your yarmulke while in uniform?

A. No.

Q. Do you recall who the overall or wing commander was at the base at the time that you reported?

A. No, I don't remember.

Q. Do you recall whether you had an opportunity to meet that person, whoever it was?

A. Yes, I did.

Q. Was that also in and around September of 1977?

A. September or early October.

Q. When you met that particular wing commander were you wearing a yarmulke?

A. Yes.

Q. Did the wing commander tell you to take the yarmulke off?

A. No.

Q. Did the wing commander tell you that there was an Air Force regulation that raised some question as to whether you could wear a yarmulke while in uniform?

A. No.

* * *

(p. 15) Q. During the term that Colonel Smith was hospital commander did you have an opportunity to meet with him or to talk with him?

A. On numerous occasions.

Q. Did you wear your yarmulke while in uniform while talking to him, meeting with him?

A. At all times, yes.

Q. Did Colonel Smith ever tell you to stop wearing your yarmulke?

A. No.

Q. Did Colonel Smith ever raise question as to the propriety of wearing your yarmulke in light of Air Force Regulation 35-10?

A. No.

* * *

(p. 16) Q. When you met with Major Young while he was your supervisor, did you have occasion to meet with him while you were in uniform and while wearing a yarmulke?

A. I saw him on a daily basis in uniform in a yarmulke.

Q. Did Major Young raise any question regarding your wearing a yarmulke?

A. No.

Q. Did he ever tell you that in light of Air Force Regulation 35-10 you shouldn't wear a yarmulke?

A. No.

Q. Did he ever tell you that in light of Air Force (p. 17) Regulation 35-10 there would be some question as to whether you could wear a yarmulke?

A. No.

Q. With respect to Major Gamboa when you met with her, did you have occasion to meet with her while you were wearing a yarmulke while in uniform?

A. On a daily basis.

Q. Did Major Gamboa ever raise question about your wearing of a yarmulke in light of Air Force Regulation 35-10 or otherwise?

A. No.

Q. Did you have occasion as well to meet with and talk to Colonels Murray or Parker—and/or Parker?

A. I doubt that I ever met with them. I would not normally in the course of my duties come in contact with them.

Q. When Lieutenant Colonel Justice came to be your supervisor did you meet with him on a daily basis?

A. Regularly, yes.

Q. Did he see you wearing your yarmulke while in uniform?

A. Yes.

Q. Did he ever raise question prior to, say, May of 1981 whether it was proper for you to wear a yarmulke while in uniform?

A. He reported to me that he had a conversation with (p. 18) Dr. Gregory, the hospital commander; that Dr. Gregory had took notice of my yarmulke, but that Dr. Gregory was going to let Dr. Justice deal with that. And Dr. Justice had told me that he did not intend to take any action at that time.

Q. At that time did he say anything to you about Air Force Regulation 35-10?

A. I don't recall.

Q. Do you recall when that occurred, approximately?

A. I would imagine that that occurred some time during the first few months that Dr. Justice was my supervisor.

There were a number of things going on with me and the clinic at that time, but certainly I think that was dealt with during the first two or three months.

Q. Until that time, had Colonel Gregory said anything to you about your wearing of a yarmulke?

A. Until what time?

Q. Until the time that Lieutenant Colonel Justice made reference to Colonel Gregory's comment?

A. No.

Q. But Colonel Gregory had seen you in uniform wearing a yarmulke?

A. I imagine so.

Q. From the period that you began with the Air Force until May of 1981, had any of your co-workers at the hospital or any of the hospital staff made comments to you or questioned (p. 19) you with respect to your wearing of a yarmulke?

A. One or two of my co-workers might have asked me what that was and why I was wearing it, yes.

Q. And what did you tell them?

A. I told them that I was an Orthodox Jew and that wearing a yarmulke was part of my religious observance.

Q. Did the conversation go any further beyond that?

A. One of them had asked me what was the particular significance and I explained that to them.

Q. In the course of performing your functions in the Air Force, I take it you see patients on a fairly regular basis?

A. Yes, I do.

Q. During the period of time that you've been affiliated with the Air Force, have any of your patients raised question with respect to why you are wearing a yarmulke?

A. Perhaps four, five, six patients asked me what it was and, again, I gave them a similar kind of explanation.

Q. During the course of your service at March Air Force Base, have there been periodic inspections of the base or of the hospital in particular?

A. Yes, there have been.

Q. In the course of those inspections, have you had occasion to meet with or talk to any of the inspecting officers while you were in uniform wearing a yarmulke?

(p. 20) A. Yes, at least on two occasions.

Q. On either of those occasions or at any other time with respect to any inspections that might have occurred, were you told that there was some question as to whether you were permitted to wear a yarmulke while in uniform?

A. No.

Q. There came a time, though, when you did receive some kind of an order with respect to your wearing a yarmulke, is that correct?

A. Yes.

Q. Do you recall when that was?

A. On May 8, 1981.

Q. Could you tell us briefly what occurred that day?

A. I was told to report to Dr. Gregory's office, and Dr. Justice, my supervisor, was instructed to come with

me. Dr. Gregory told me that the wing commander did not want me wearing a yarmulke anywhere on base indoors, and that Dr. Gregory was given the discretion by the wing commander as to whether or not I would be allowed to wear it in the hospital and that Dr. Gregory was going to permit me to wear the yarmulke in the hospital.

Q. In addition to Lieutenant Colonel Justice, who else was present in that meeting besides you and Dr. Gregory?

A. I don't believe anybody else was present. I don't believe so.

(p. 21) Q. Did Colonel Gregory tell you you were not permitted to wear a yarmulke outside of the hospital while in uniform at the base?

A. In other buildings on the base. Yes, he did tell me that.

Q. Did he give you a written order or an oral order?

A. It was verbal.

Q. Did Colonel Gregory explain to you his distinction or reason he was making a distinction between your appearance at the hospital with a yarmulke as to allowing it while forbidding you to wearing it in any other building on base?

A. No, he did not.

Q. Did you have an opportunity or an occasion in the course of that meeting to discuss with Colonel Gregory your view, the reasons why you wanted to wear a yarmulke?

A. I very briefly stated that wearing a yarmulke was a religious observance; that I thought that there was a

significant legal qeustion as to the validity of the order; and I informed him that I would continue wearing the yarmulke.

I thanked him for allowing me to continue wearing it in the hospital and I indicated that perhaps I should discuss this personally and directly with the wing commander to find out what's going on as far as the rest of the base.

Q. What did Colonel Gregory respond to you?

A. Colonel Gregory indicated that it wouldn't be (p. 22) necessary for me to see the wing commander; that the wing commander was letting me know through Dr. Gregory what the wing commander wanted; and that—he indicated—that if I chose to disobey the order I could be subject to a court martial.

Q. After receiving the order and after you finished that particular meeting that you were in, what did you do?

A. I sought legal counsel and I consulted with various rabbinic authorities, and I also consulted—I contacted the Staff Judge Advocate, Major Ronald Rakowsky, to try to get some more information on why this order was being given.

Q. Why did you contact other rabbinic authorities?

A. I sought confirmation of my beliefs. I anticipated that there could very well be a major legal confrontation, and so I wanted to acquire support.

Q. Did those rabbis that you consulted confirm your position that Orthodox Judaism requires or at least has as part of its observance the wearing of a yarmulke or other head covering at all times by males?

A. Yes, they did.

Q. Can you recall with whom you consulted at that time?

A. I called Rabbi Herschel Schachter, who is the Chairman of the Commission on Jewish Chaplaincy of the National Jewish Welfare Board. That organization is—I believe—the official agency accredited to the Department of Defense that (p. 23) represents the Jewish faith on matters of religious—on religious matters.

I consulted with Rabbi Bess, a member of the faculty of an advanced institute for Jewish studies in Los Angeles, and he is a rabbi that I've consulted previously on other religious matters.

I also consulted with Rabbi Meiselman who is the Academic Dean of Yeshiva University of Los Angeles, who I have consulted on religious matters previously.

Q. You also indicated that you consulted—sought to consult with—Major Rakowsky.

A. That is correct.

Q. When did you talk to him?

A. On May 8th. I called him after my meeting with Dr. Gregory and I asked him if he had obtained any information personally with regard to the nature of the wearing a yarmulke. He said no, he had not.

I asked him what kind of legal counsel he had given the wing commander, and Major Rakowsky told me that he offered the opinion to the wing commander that wearing a yarmulke is not authorized in uniform according to AFR 35-10.

I raised with Major Rakowsky my concern about the constitutional issues and told him that I could provide him with a newspaper clipping that reported a case of an active duty Air Force medical officer, I believe at Pease Air Force (p. 24) Base, that had been threatened with a court martial for wearing a yarmulke while in uniform and that matter had been resolved quietly.

I also made reference to other newspaper clippings about Federal District Court rulings in a Supreme Court case. Major Rakowsky responded that Federal District Court—the Federal Government is not necessarily required to follow a Federal District Court ruling; that a Federal District Court ruling is only good in the district in which it's given; and that the trend of litigation of the kinds of religious issues that I had been referring to have been going against the plaintiffs.

Q. Despite these conversations, you continued to wear your yarmulke at all times while in uniform?

A. Yes, I did.

Q. Did there come a time when you received a subsequent order after the May 8 order concerning your wearing of a yarmulke?

A. Yes.

Q. When was that?

A. On 23 June 1981.

Q. Would you describe for us briefly what occurred at that time?

A. I was called to Dr. Gregory's office. I met with Dr. Gregory and Colonel Julius Archie. Colonel Archie

is the (p. 25) hospital Administrator. And I was given a written order which was read to me by Dr. Gregory, ordering me to stop wearing the yarmulke in uniform, period.

MR. BUTLER: Would you mark this, please?

(Plaintiff's Exhibit No. 1 was marked for identification.)

BY MR. BUTLER:

Q. Captain Goldman, I have what has been marked for identification as Plaintiff's Exhibit No. 1. It is a document dated 23 June 1981. Can you identify that document for us?

A. Yes, I recognize it.

Q. What is it?

A. It's entitled "Subject: Violation of AFR 35-10." I am informed that wearing of the yarmulke is in violation of AFR 35-10—

Q. Is this the written notice that you are referring to that Colonel Gregory gave you at the meeting on the 23rd of June?

A. Yes.

* * *

(p. 26) Q. Is everything contained in that paragraph accurate with respect to what occurred when the document was handed to you?

A. It's incomplete.

Q. What else occurred at that time?

A. During that interview, on two separate instances, I asked to speak with Dr. Gregory about my concerns

about the order. He refused to talk with me. I told him that I thought the order was illegal, based on constitutional grounds, and he told me—he indicated that his order had the approval of the wing commander and the SAC Surgeon General, General Greendyke.

I requested permission to temporarily report for duty in civilian clothing in order to avoid a legal confrontation. On the 23rd of June at 8:00 in the morning or thereabouts, the information I had—all the information that I had available to me—was that my legal counsel was negotiating with legal counsel in Washington, and I had not been informed of any final decisions about anything, so I requested permission to report to duty temporarily in civilian clothing.

(p. 27) Q. Did Colonel Gregory allow you to do that?

A. No, he refused permission.

Q. Upon your receipt of the order, did you stop wearing your yarmulke while in uniform?

A. No, I did not.

Q. Did Colonel Gregory explain to you why he was changing his order as of the 23rd of June from what he had initially told you on the 5th (sic) of May?

A. No, he did not.

Q. To your recollection, was anyone else present at the time, other than Colonel Archie, on the 23rd of June?

A. No.

With regard to the receipt, I told Colonel Gregory and Colonel Archie that I know that there was no—I just

didn't want to sign the receipt, but I knew that it didn't matter, they would simply witness the fact that they had given it to me.

Q. After your meeting with Colonel Gregory and Colonel Archie on the 23rd of June, did you have a subsequent meeting with them with respect to the yarmulke question generally?

A. I had a meeting on the 24th in the morning. I don't recall if Colonel Archie was present for that meeting, but I had a meeting in Dr. Gregory's office with Dr. Gregory in which he told me he was ordering me to report back to his (p. 28) office at 1:00 that afternoon in uniform without a yarmulke, and if I was wearing a yarmulke in uniform at 1:00, he would give me a Letter of Reprimand.

Q. So he called you in in the morning to tell you to report back in the afternoon—

A. Yes.

Q. —in uniform without a yarmulke.

A. That's correct.

Q. Did you report back in the afternoon as he ordered you to do?

A. Yes, I was there in uniform wearing a yarmulke.

Q. Was anyone else present in the room when you reported?

A. At that meeting, Colonel Archie was present, I believe, and Major Ronald Rakowsky, the Staff Judge Advocate, was present.

Q. What occurred at that meeting?

A. Colonel Gregory gave me a written Letter of Reprimand and I believe he read its contents to me.

MR. BUTLER: Would you mark this, please, as Plaintiff's No. 2?

(Plaintiff's Exhibit No. 2 was marked for identification.)

BY MR. BUTLER:

Q. I show you what has been marked for identification (p. 29) as Plaintiff's Exhibit No. 2. Can you identify that document?

A. Yes. This is the Letter of Reprimand that I was given on the 24th of June by Dr. Gregory.

Q. Was there any discussion beyond Colonel Gregory's reading to you of the Letter of Reprimand?

A. I asked him again for permission to report temporarily for duty in civilian clothing to avoid a further legal confrontation, and that request was denied.

Q. Had you had an opportunity to determine the possibility of other kinds of sanctions that could be imposed upon you for violating the order?

A. Yes, Dr. Gregory—I had two conversations that day. It might have been in the morning or in the afternoon. He indicated that if I failed to obey that there would be further steps taken. I specifically asked him what those steps were, and he simply said "This is the first step."

On May 8th he had specifically mentioned a court martial as a possibility.

Q. What else occurred at that meeting on the 24th—the second meeting on the 24th of June?

A. I gave Colonel Gregory a letter requesting that any further processing of the Letter of Reprimand be delayed until the return of my military legal counsel on the 29th of June. After a brief consultation with Major Rakowsky, at which time I wasn't present, they indicated that they would (p. 30) comply. Actually, they said "We won't do anything for a day or two. We'll get back to you." Then the next day, I was told that they would not take any further action on the Letter of Reprimand until the 29th of June, after I had time to consult my counsel.

MR. BUTLER: Would you mark this, please, as Plaintiff's Number 3?

(Plaintiff's Exhibit No. 3 was marked for identification.)

BY MR. BUTLER:

Q. Captain Goldman, you have before you what has been marked for identification as Plaintiff's Exhibit No. 3. Is that the letter that you gave to Colonel Gregory requesting the delay of the processing of the Letter of Reprimand?

A. Yes, this is the letter.

Q. After you finished that meeting, what did you do?

A. I sought further legal counsel.

Q. Did you continue wearing your yarmulke while in uniform?

A. Yes, I did.

Q. When was the next time you met with Colonel Gregory or had some other formal meeting with Air Force personnel with respect to the yarmulke question?

A. The next day, on the 25th of June, I was called to Colonel Gregory's office. Captain Haseltine was present (p. 31) for the conversation, I believe as a witness. Colonel Gregory informed me that because of my faiiure to obey his order to obey 35-10 and because of the Letter of Reprimand, essentially because he was having trouble with me with regard to that issue, he decided to withdraw a favorable recommendation he had previously made for my application to stay on active duty for one more year. And instead, he gave me the choice either to withdraw my application, and if I did not withdraw my application, he would, that day, the 25th of June, forward to the Personnel Division a negative recommendation advising the Air Force not to extend my active duty service.

Q. What did you tell him with respect to that issue?

A. I told him that I hadn't decided what I wanted to do about submitting the application, but that perhaps he would change his mind in a month or two and I could submit it at that time, or if I decided to go ahead and submit the application, I would do so, even with his negative recommendation.

MR. BUTLER: Would you mark this, please, as Plaintiff's Number 4?

(Plaintiff's Exhibit No. 4 was marked for identification.)

BY MR. BUTLER:

* * *

(p. 34) Q. Did there come a time when you were advised that formal processing had again commenced?

A. Yes, that was on the 30th of June. I was notified of—I believe the form is Notification of Intent to file—something—Unfavorable Information File. And at that time I was given—I believe I was given three days—to submit a written rebuttal as to why or why not the Letter of Reprimand for violating 35-10 should or should not be placed in an Unfavorable Information File.

Q. What did you do after receiving notice that your Letter of Reprimand was being processed in a formal sense?

(p. 35) A. I again contacted my legal counsel and was advised to obtain leave.

Q. Did you make application?

A. I did. At the end of the work day on the 30th of June, but the paperwork couldn't be processed prior to the close of work, and I reported for duty on the 1st of July and obtained written permission to go on two days' emergency leave.

Q. When you first signed on with the Air Force, what was the length of your initial commitment?

A. Three years.

Q. That expired—

A. August 31, 1980.

Q. Why are you still in the Air Force now, then?

A. I very much enjoyed my work in the Air Force and I very much enjoyed practicing my profession in the

Air Force, and wanted an opportunity to be considered for a career appointment, therefore, I requested a one-year extension and it was granted.

Q. So you were extended from the 31st of August of 1980 to the 31st of August 1981.

A. 1 September '80.

Q. With respect to Exhibit 4, the Specified Period of Time Contract, that was an application for another year of extension, is that correct?

A. That is correct.

Q. Is that application still pending?

(p. 36) A. No. I withdrew that application after Dr. Gregory submitted the negative recommendation.

Q. What is your current date of separation from the Air Force?

A. 31 August 1981.

Q. Is it your intention to continue service in the Air Force?

A. I intend to separate from active duty on the 31st of August. I also want to continue my affiliation with the Air Force through the Air Force Reserve in their training programs.

Q. Have you made formal application for that position?

A. Yes, I have.

Q. When did you make the application?

A. I obtained the forms prior to 15 July '81. On the 15th of July, I gave to Colonel Gregory's secretary a Unit of Attachment Agreement, which is one of the—being affiliated with a unit is one of the requirements of the application process.

On the 20th of July, I mailed out to the Reserve Headquarters in Denver two of the application forms, but since I had not been provided a Unit of Attachment Agreement by them, I couldn't submit that.

Q. Was March Air Force Base the only facility to which you applied for Reserve training?

(p. 37) A. No. I also spoke on the phone with the commander of a medical clinic at Los Angeles Air Force Station about affiliating, getting training there.

Q. Did you submit a formal application there?

A. Yes, I did mail a Unit of Attachment Agreement to the commander there.

Q. I think you said you talked on the phone with him. What was the substance of that conversation?

A. I had two conversations with him. The first conversation, he expressed great interest in having my services there. He said "We sure could use you." I had been told by Headquarters in Denver that they were losing a mental health professional and would probably be able to use me there, and, in fact, that's what the commander of the medical clinic there said.

I subsequently—some time the week of July 20th—called him again because I had not received—I had sent him a carbon and asked him to return the carbon to me.

I called him again and he said he had not taken any action on my Unit of Attachment Agreement. He indicated that he had heard some rumblings about me, and that since I was a subject of controversy, he wanted legal counsel prior to taking any action on that.

Q. Did he indicate what the nature of the "rumblings" were? Any particular issue that it was addressed to?

A. No, but he didn't sound surprised when I told him (p. 38) it was with regard to my yarmulke.

The conversation I had with him was on a—the second conversation was on a Thursday. I believe it was two weeks ago. He indicated to me that he was—it might have been a Friday. It was either Thursday or Friday. It was the day before he was going on leave for a couple of weeks, and I explained to him my interest in getting that Attachment Agreement filled out, and I asked him if he would —if he could possibly get it done before he goes on leave, or give instructions to his acting commander in his absence to be able to action on my application, once legal counsel had been obtained by him.

Q. Have you received any word back from the L.A. Air Station?

A. No, I haven't. During the course of that second conversation he again, after acknowledging the rumblings and that I was a controversial figure and he wanted legal counsel, he did, nevertheless, say that he could use my services.

Q. What about your application for Unit of Attachment Agreement at March Air Force Base? Have you received anything back on that application?

A. No, I have not.

Q. Have you made any inquiry as to why you haven't received word back?

A. Yes. I made several inquiries. I inquired of the (p. 39) base legal office where it had been sent when it might be done. I inquired of the Resource Management Office where it was originally sent what was happening with it. I inquired of Colonel Archie, the Hospital Administrator, about what was happening with it.

I spoke with Colonel Slarve, who was the hospital commander while Dr. Gregory was on leave, and I spoke with him verbally on a Friday afternoon, and then on a Monday morning, the following Monday, I gave him a written request, asking Colonel Slarve to take action on my Unit of Attachment Agreement in his official capacity as the hospital commander.

Q. What response have you received with respect to those inquiries?

A. Well, with regard to Colonel Slarve—the inquiry to Colonel Slarve—Colonel Slarve said that he had talked with Colonel Gregory that day and that Colonel Gregory asked him to leave the matter alone and that Colonel Gregory would handle the matter when he returned from leave on August 10th.

Q. Why did you decide not to seek a Specified Period of Time Contract with the Air Force for another year?

A. Basically because the working environment and atmosphere in the clinic and the hospital had changed dramatically once this controversy arose.

Q. But you do want to continue serving the Air Force Reserve.

(p. 40 & 41) A. Very much so. I would like to go into the active Reserves and receive active training for promotion and retirement.

Q. During the course of your service in the Air Force, have there been occasions where you've been formally reviewed and evaluated by the Air Force?

A. Yes.

Q. Do you recall how many times you've—

A. Five times.

MR. BUTLER: Would you mark these, please, in order, 5 through 9?

(Plaintiff's Exhibits 5, 6, 7, 8, 9
were marked for identification.)

BY MR. BUTLER:

Q. Captain Goldman, you have before you what have been marked for identification as Plaintiff's Exhibits 5 through 9. Are those the five Officer Evaluation Reports that you have received during the course of your service in the Air Force?

A. Yes.

Q. Are any of those from Colonel Gregory?

A. No.

Q. You've not yet received a formal evaluation from Colonel Gregory?

A. No, not from Colonel Gregory and not from Colonel Justice.

(p. 42) Q. Do you recall whether on any of those evaluations you have been criticized or chastised for wearing a yarmulke while in uniform in violation of AFR 35-10?

A. No.

Q. Let me ask you once again, in any of these five evaluation reports, are you aware of any reference—or is there any reference—in the forms to your violation of AFR 35-10 for wearing a yarmulke while in uniform?

A. I have read all these reports, and there is no reference whatsoever to violation of AFR 35-10.

Q. In the past three evaluation reports, at least in my reading, indicates that you have been marked with the highest rating "Well above standard" in all areas regarding performance factors. Is that correct?

A. That is correct. That's what they show.

Q. And in your first two evaluations, you were marked in the majority of instances, I believe, "Well above standard" and in some other instances, the standard just below that, which is "Above standard," is that correct?

A. Yes. On the first one there were five "Well above standard" and five were "Above standard"; in the second one, seven out of ten categories were marked "Well above standard," and three were marked "Above standard."

Q. You have already indicated in response to some of my questions the nature of reaction that you received from (p. 43) commanding officers and other personnel on base, as well as civilian persons on base, to your wearing of a yarmulke from the period that you began in the Air Force until May of 1981.

Prior to the time that you filed this lawsuit in the beginning of July, was there any change in the reaction generally, other than what Colonel Gregory had told you and what you had discussed with Colonel Justice and Major Rakowsky?

A. Prior to May 8th, there was no change in the reaction that I received from people that I came in contact with on the base.

Q. I'm asking prior to July 2nd.

A. Prior to July 2nd, there was no basic change.

Q. Since the time that you have filed this lawsuit, have you received reactions from your co-workers or the staff personnel at the hospital?

A. Yes, I've received numerous reactions from people, most of which were supportive. All of which were supportive.

Q. Have you heard any comments from civilians on base with respect to your filing of this lawsuit or your wearing of the yarmulke since the filing of the lawsuit?

A. Yes, I have. They were also generally sppportive.

Q. Has anyone told you, since the time you've been affiliated with the Air Force until today—anyone at the Air Force—given you any indication that your wearing of a yarmulke somehow interferes with the *esprit de corps* of the (p. 44) Air Force?

A. No one has ever made that kind of remark to me.

Q. Has anyone told you that your wearing of a yarmulke has an effect on the ability of the Air Force to maintain discipline within its ranks?

A. Other than Colonel Gregory in a written remark, no.

Q. Have you got any basis upon which to make a judgment, or has anyone told you that your wearing of a yarmulke somehow affects the public's perception of an airman?

A. No one has ever made that kind of remark to me.

MR. BUTLER: I've got nothing further at this time.

MR. LAWRENCE: I would suggest a brief recess before we resume with cross-examination.

THE WITNESS: Good idea.

(Ten-minute recess taken.)

CROSS-EXAMINATION

MR. LAWRENCE: Captain Goldman, I'm Craig Lawrence; I am an Assistant U. S. Attorney; I represent the Government in this action, and with me are Major Moran and Captain Fiscus from the Air Force.

BY MR. LAWRENCE:

Q. You indicated in your direct testimony that, I believe it was immediately upon graduating and obtaining your—correct me if I'm misstating the term—rabbinical degree, you began a career in the Navy as a chaplain. Is that correct?

(p. 45) A. Yes, it is.

Q. You were in the Navy, then, from 1970 to 1972.

A. Yes.

Q. During that period of time, what, generally, were your duties as a rabbi in the Navy?

A. I provided religious services, educational services, cultural services.

Q. Did you maintain a Jewish congregation where you were stationed?

A. There was a very, very small Jewish congregation. Most of my activities were of a general chaplain's nature.

Q. Were the individuals in your congregation, then, active duty military, or did they include civilians?

A. They included dependents of active duty.

Q. Did they also include active duty personnel?

A. Yes.

Q. Were there both enlisted and officer personnel?

A. Yes.

Q. During this period in the Navy, in your contact with the active duty Navy personnel, were the members of your congregation—the male members of your congregation—wearing yarmulkes?

A. At religious services they were, yes.

Q. Were they wearing yarmulkes at times apart from your religious services?

(p. 46) A. Occasionally when I saw them at their duty station—at their place of duty—I didn't see them wearing a yarmulke.

Q. You left the Navy in August of '72, is that correct?

A. Yes.

Q. For what reason did you leave the Navy?

A. I completed my obligated tour of duty, and during my two years there I had developed a great interest in counseling, because that was a large part of what I did to the general military population there, and I wanted to get more professional training in counseling.

Q. Did you seek to stay on active duty in the Navy?

A. I did not submit any application to stay on active duty in the Navy.

Q. Did you request an ecclesiastical endorsement prior to your departure from the Navy?

A. I made no formal request for ecclesiastical endorsement.

Q. Was there any action taken on your ecclesiastical endorsement while you were in the Navy or before you left?

A. There was no action taken on my initial ecclesiastical endorsement.

Q. Was there any subsequent ecclesiastical endorsement request made or acted on?

A. I never made any formal request for a second ecclesiastical endorsement.

(p. 47) Q. Do you know whether one was submitted —I'm not sure how this works. How does it work? Maybe that's a better initial question.

A. I'm not sure how it worked either.

Q. We're in the same boat.

Were you ever denied an ecclesiastical endorsement?

A. Well, if I never submitted a formal request for ecclesiastical endorsement, I guess I couldn't be formally denied one.

Q. Were you or were you not, or do you know, ever denied ecclesiastical endorsement?

MR. BUTLER: He's answered. He never submitted a second formal request and he's not aware of it ever being denied in formal sense either.

MR. LAWRENCE: He said "if" he never requested a formal—

THE WITNESS: Well, I never requested a formal endorsement.

BY MR. LAWRENCE:

Q. That's correct. Now the question is were you ever denied an ecclesiastical endorsement?

A. I was never denied a formal ecclesiastical endorsement.

Q. You applied for the Air Force, as I understand it, in September of '72, correct?

(p. 48) A. No, I applied several months before then. In the spring or possibly the first quarter of 19—

the first quarter of 1973 was when I applied for the Air Force.

Q. You then did not apply until after you had already left the Navy, is that correct?

A. That is correct. It was during the period that I was serving as a rabbi in Mt. Clemens, Michigan that I made the application procedure.

Q. How long after you had made the application did you hear?

A. I don't know. Approximately two, three months. I believe I was notified some time around April or May of 1973 that I had been accepted into the program.

Q. Then you began your schooling in September or the fall of that year?

A. September of '73, that is correct.

Q. During your application, were you obliged to commit yourself to a certain amount of active duty time in return for—what is it? a scholarship? Is that what that—

A. It was the Health Professions Scholarship Program and the basic obligation was for three years of support, one would have three years of obligated service.

Q. Three years of active duty service would be the return.

A. Yes, uh-huh.

(p. 49) Q. Was that for the completion of any particular program or was that a sliding scale for your particular program? That is, if you wanted to, let's say, go into an M.D. program, would it be a greater commitment?

A. I have no idea about M.D. regulations.

Q. Prior to your acceptance into the program, did you have any interviews or conversations with any active duty Air Force personnel about the program?

A. I had a telephone conversation with Colonel Levinson, I believe was his name, and he was I believe at that time the senior psychologist or Chief of Psychology for the Air Force, and I contacted him about the application procedure.

Q. Did you have any orientation materials or booklets sent to you about life in the Air Force along in that period of time?

A. I believe there were some information pamphlets sent to me during—after I had signed on with the Health Professions Scholarship Program. Materials were occasionally sent to me.

Q. This was after acceptance into the program?

A. Yes, that's correct.

Q. Did you perform any active duty while you were going through your schooling as part of the program?

A. I had three 45-day tours of active duty. These active duty tours were performed at my university.

(p. 50) Q. Did you—were you required to wear a uniform or do anything which would distinguish you as an Air Force officer or a program person during those 45-day tours of duty?

A. Absolutely not.

Q. Were these, then, part of your education, or were these more—were they duty-oriented or education-oriented or both?

A. It was education-oriented. Basically, the way it was explained to me is that I needed those 45-day periods to continue my education so that I could complete my degree on schedule, then the Air Force would not require me to report for active duty at an Air Force base, but that if my educational requirements did not require me to keep busy with school during those 45-day periods of time, I would report for duty at an Air Force base.

Each time that my 45-day tour of active duty came up, I was granted permission by the Air Force to continue my schooling at school.

Q. So the Air Force accommodated your 45-day tours and allowed you to take them at the university rather—

A. That is correct.

Q. The other requirement would have been performance of this 45-days of active duty at a, I presume, a hospital somewhere?

A. Wherever they would send me.

(p. 51) Q. When was the first occasion that you appeared anywhere in an Air Force uniform?

A. It was at March Air Force Base, some time in middle to probably late September of 1977.

Q. This was after you had formally entered on active duty?

A. That is correct.

Q. During your initial processing at March Air Force Base, the people who were working with you, processing, were predominantly—strike that.

The people who were initiating your processing were all enlisted, were they not?

A. I would say predominantly, yes.

I should mention that I was assigned a sponsor which is a standard procedure in the base "intro" program and that was a captain assigned to the mental health clinic. He was my official sponsor to help me get oriented.

Q. How were you dressed when you were processing in at March Air Force Base?

A. I was dressed in civilian clothes because I had no opportunity prior to then to acquire military uniforms.

Q. So your first appearance in a uniform was not until you had completed inprocessing, is that correct?

A. My first appearance in uniform was not until I had managed to purchase military uniforms, but I believe I was in (p. 52) uniform for part of the mandatory in-processing.

* * *

(p. 53) Q. During your period at March Air Force Base, did you come in contact with other, either members of the profession, or enlisted people who were working at March Air Force Base at the hospital who were Jewish?

A. During which period of time?

Q. During the time that you were assigned to active duty at March Air Force Base.

(p. 54) A. Yes, I have met a few Jewish personnel assigned to March.

Q. Are any assigned to the hospital?

A. Yes.

Q. How many, roughly?

A. I can think clearly of two people. One is a woman. The other is Dr. Slarve. There may have been one or two others.

Q. Dr. Slarve is the individual who you mentioned is currently the acting—

A. Hospital Commander.

Q. —hospital commander?

A. Yes.

Q. Does Dr. Slarve wear a yarmulke?

A. No, he does not.

Q. I'm speaking about only the time that you have come in contact with him at the hospital.

A. Dr. Slarve indicated to me in a recent conversation that he practices his religion differently than I do.

Q. But other than Dr. Slarve and the woman you indicated, have you come in contact with any other Jewish officials at the—

A. I was visited by the Jewish lay leader when I was hospitalized at the hospital.

Q. You say "lay leader." Was he an Air Force official? That is, would he be a chaplain?

(p. 55) A. No, he was not a chaplain. I was visited by a Jewish lay leader. He is an active duty enlisted person. Your mentioning a chaplain, I have been visited occasionally by a Reserve chaplain who was getting Air Force Reserve training at the base.

Q. With respect to the lay leader, you said he was active duty enlisted?

A. Yes, that's correct.

Q. Did he wear a yarmulke?

A. No, he did not.

Q. Was he in uniform?

A. Yes.

Q. I'd like to touch on a few other points as we move on through. I notice, Captain Goldman, that you don't wear a beard. Is not a beard a part of the tradition for Jewish rabbis?

A. Wearing a beard is a tradition for some rabbis, yes, but I know of many rabbis who don't wear a beard, including my father who was an Orthodox rabbi. He never wore a beard.

Q. Is there not a certain tradition with regard to destroying the beard, or I believe there was some comment somewhere about "rounding the corners of the face"?

A. Yes, there is, but there are various interpretations of that verse in the Bible. One of the basic points in interpreting the Bible is never to do so solely on the basis (p. 56) of the literal text alone.

Q. But it would be in keeping with traditional practices for rabbis to wear beards—certain rabbis to wear a beard?

A. It would be in keeping with traditional practice for anyone to wear a beard, and it would not be in violation of any religious requirement not to wear a beard.

Q. We're getting into an area that I'm afraid I'm a little bit short of knowledge on and I'm going to have to ask you to help me a little bit. We talked about—and I believe some of the papers that you have filed talk about—a requirement and a tradition.

Is there not a distinction within the Jewish religious teachings between a requirement and a tradition?

MR. BUTLER: I take it you are asking Captain Goldman for his understanding of these observances.

MR. LAWRENCE: Yes.

THE WITNESS: There are numerous and different gradations of requirements. It's a highly complex subject and I do not consider myself an authority to give you an authoritative answer as to the distinctions.

I can mention, if you wish, about six different variations right now if you'd like.

BY MR. LAWRENCE:

Q. Okay. Just briefly. I don't want to obviously take up too much of your time on this.

(p. 57) A. Well, there are Biblical requirements of Biblical force. There are rabbinic enactments related to Biblical requirements of Biblical force. There are rabbinic enactments regarding Biblical enactments of rab-

binic force. There are various kinds of rabbinic enactments, some of which have Biblical force and some of which have rabbinic force. And then there are customs, traditions, so forth, that are in force. So it's a highly complex field.

Q. Let's take an example of going back to the wearing, for example, of the yarmulke. Does it affect, in a religious practice sense, whether, for example, the lay leader with whom you spoke—the active duty enlisted man who did not wear a yarmulke—is there any lack of indication of his faith by the fact that he did not wear a yarmulke at all times?

A. I don't know what the man's degree of faith is. I can tell you that there are devout Reform Jews who do not believe in wearing a yarmulke.

Q. What about—are there other Orthodox practitioners such as—I am speaking now of your own particular general sect, if you will, who do not wear yarmulkes?

A. Yes.

Q. Is it then a matter, in part, tied to the personal beliefs of the individual?

A. Can you elaborate on what types of "personal beliefs of the individual" means?

(p. 58) Q. I'm afraid I'm a little bit at a loss. My tradition and background is different from yours, and I am trying to understand to a degree the distinction between, let's say, the group of Orthodox practioners of the Jewish faith who wear a yarmulke and those who do not.

MR. BUTLER: I'm sorry. Would you repeat the question?

BY MR. LAWRENCE:

Q. Okay. I'm not sure I can go back—the question I have is, generally, is there a different, let's say, status or—strike that.

I think what I was getting at was whether the determination of the individual who is a practicing member of the Orthodox sect—for want of a better term—is it a personal determination of the individual to wear a yarmulke or not?

MR. BUTLER: You have the right to ask Captain Goldman what his particular practices are. Captain Goldman has already indicated he doesn't consider himself an expert in all of these areas, and I'm not sure that he's qualified to repond on behalf of other people.

To the extent that Captain Goldman's practice is in issue in this litigation, you are entitled to ask him about his practice.

MR. LAWRENCE: But my understanding from the (p. 59) discussion of his background was that he was ordained a rabbi, and certainly, all I'm asking is to the extent of his religious training and background whether he can make that—

MR. BUTLER: He certainly is a rabbi, and just as you and I are lawyers, we're not well-versed, necessarily, on patent law. I'm not saying that Captain Goldman is versed in this particular area or not. He has indicated to you he doesn't consider himself an expert in these areas.

You are entitled to ask him about what his belief is and the nature of his practice.

MR. LAWRENCE: I would like to get a little more general to understand it a little better myself. I mean we're obviously in an area where Captain Goldman has indicated that some members of the Orthodox Jewish faith do not wear yarmulkes and I am trying to find out how that distinction is made on an individual basis; whether it's a matter of personal belief, and take it from there.

MR. BUTLER: To the extent Captain Goldman feels he's qualified to speak for reasons that others practice their religion in a different or some fashion, I have no objection to him answering it, but I want it to be clear on the record that this witness has not indicated that he is an expert and that my belief is he can only testify as to what he knows with respect to his own practice.

THE WITNESS: I wear a yarmulke because it's a (p. 60) religious observance—a traditional religious observance.

BY MR. LAWRENCE:

Q. What about those members of the Orthodox faith who do not?

A. I can't account for their behavior.

Q. In the Orthodox faith, are they considered to be less—for want of a better term—holy than those who do wear yarmulkes?

MR. BUTLER: By whose standards? By what judgment? That question isn't clear enough.

MR. LAWRENCE: By the judgment of, let's say, the theological authorities that you studied when you were in Yeshiva University.

THE WITNESS: Again, I would reiterate that I don't consider myself an expert on these matters, but I would simply say that within Orthodox Judaism, which is one of several denominations of Judaism, there are many variations of attitude and belief with regard to numerous traditions, practices, customs, obligations, and within those viewpoints or attitudes there are different gradations.

So I think it's quite possible that there can be many Orthodox Jews who are devout and committed to their religion who do not see it as necessary to wear a yarmulke when they go to work.

MR. LAWRENCE: "Devout," I think, is the term I was (p. 61) looking for. Thank you.

BY MR. LAWRENCE:

Q. Do you have a congregation now, Captain Goldman?

A. No, I do not.

Q. Do you attend daily services?

A. I pray three times a day privately, and I go to the synagogue on Sabbath and holidays.

Q. Is not attending daily services part of a tradition, if you will, of the Orthodox Jewish faith as you understand it?

A. There is a tradition to attend public services if possible, and there is a requirement to pray each day.

Q. Where is the synagogue which you attend on the Sabbath?

A. It's about a mile from my home.

Q. Does the synagogue have daily services?

A. The synagogue has three daily services. Due to my work schedule, I cannot attend.

Q. What is your work schedule at March Air Force Base?

A. I work there from 7:30 to 4:30.

Q. How far is—you indicated that you live in, I believe, Los Angeles and work at March. How far is that?

A. It's about 74 or 72 miles.

Q. How long a daily commute does that—not "daily," one-way commute?

A. About an hour-and-a-half.

(p. 62) Q. Do you keep a kosher household?

A. Yes.

• • •

(p. 63) Q. Do you wear a prayer shawl at all times?

A. No, I wear a prayer shawl at morning prayer services.

Q. Is it not a tradition of the Orthodox Jewish faith that maintains that it is appropriate to wear a prayer shawl at all times, even under one's clothes?

A. That is not a prayer shawl.

Q. I beg your—what is that?

A. Oh, how do I translate it into English? It is "fringes." We call it that. "Fringes."

Q. Fringes?

A. Yes.

Q. Do you wear that at all times? Do you wear fringes?

A. I wear that during the day when it is traditional to wear it. Under my clothing.

Q. But it is not, then, traditional to wear that at all times.

A. It is not required to wear it in the evening.

Q. And do you wear it at all times during the day while you are on duty?

A. Yes.

Q. Is what you're speaking of an *arba kanfot?*

A. That's one of the names, *arba kanfot,* yes. That's Hebrew for four corners.

Q. So that is the fringes that we—

A. Yes, that's the fringes that I'm referring to.

(p. 64) Q. I assume, Captain Goldman, and from your discussions I think it's fairly clear that you maintain the Sabbath—your Sabbath.

A. Yes, that's true.

Q. Have you received permission from the Air Force to depart work early on Friday afternoons in order to maintain your practices—your Sabbath?

A. I did for a period of about three-and-a-half years have permission to do that, and when I was told to remain at work until 4:30 on Friday, I complied.

Q. When you were told to remain at work?

A. I would say it was some time after the yarmulke issue arose. Whether it was May—late May or early June, I don't recall.

* * *

Q. Captain Goldman, when you began your Air Force career—after you began your Air Force career—when was the first time you became acquainted with Air Force Regulation 35-10 and the requirements for uniformity and its application to the yarmulke?

A. Some time after May 8, 1981.

(p. 65) Q. That was your first inkling that wearing the yarmulke or first indication of any kind that wearing a yarmulke might be inconsistent with AFR 35-10.

MR. BUTLER: Are you asking the question apart from Colonel Gregory's instructions—

MR. LAWRENCE: Yes.

MR. BUTLER: —instructions to him on the 8th of May.

MR. LAWRENCE: Yes.

BY MR. LAWRENCE:

Q. Apart from Colonel Gregory's instructions on the 8th of May—

A. Yes.

Q. Were you ever at any time prior to that point given any indication that the AFR 35-10 precluded the wearing of a yarmulke?

A. Not that I can recall, no.

Q. When was the first occasion on which you requested permission to continue to wear the yarmulke?

A. On the 8th of May 1981.

Q. Did you ever inquire of anyone about the wearing of the yarmulke prior to May 8th 1981 while in uniform?

A. Inasmuch as my supervisors and hospital commanders saw me frequently wearing it, I didn't see any need to inquire about it.

(p. 66) Q. Do you know Air Force Chief Master Sergeant Johnson?

A. No, I do not. I don't recognize the name.

MR. BUTLER: Do you have a first name of this man?

MR. LAWRENCE: He was Chief of Nursing, as I understand it, at March Air Force Base for a period of time.

THE WITNESS: I don't recognize the name. I never had any professional or personal dealings with the man.

I'm not a very well-known person in the hospital. I generally stay in the clinic and do my work and go home. A lot of people have said "Oh, when did you arrive?" "About two or three, a year ago, three-and-a-half years ago."

BY MR. LAWRENCE:

Q. You are unaware, then, that any complaints may have been voiced by Chief Master Sergeant Johnson or any others?

A. That's correct. This is the first time I'm hearing about it.

MR. BUTLER: Do you have a first name for him?

MAJOR MORAN: George.

MR. LAWRENCE: George.

MR. BUTLER: Do you know anything about where he is presently?

MR. LAWRENCE: I'm not sure where he is presently. I think we can get into that.

MR. BUTLER: Yes, that's fine.

MAJOR MORAN: You'll probably get it in the (p. 67) interrogatories.

MR. LAWRENCE: I have no further questions.

MR. BUTLER: I have just a couple to follow up on some of the things that Mr. Lawrence had inquired concerning—

REDIRECT EXAMINATION

BY MR. BUTLER:

Q. With respect to your early departures on Fridays, you indicated that since some time after May of this year you've been staying until 4:30. Are you still able to get home in the summertime before Sabbath begins?

A. Yes, I am.

Q. Then the major problem would be in the wintertime when the sun sets earlier?

A. Yes, the major problem would be when the Sabbath starts about 4:15, 4:20.

Q. You're wearing a yarmulke right now.

A. Uh-huh.

Q. Is that substantially similar to the kinds of yarmulke or the kind of yarmulke that you wore in the past or have worn in the past while in uniform at March?

A. It's similar in size and it's a single color. Right now it's brown. Before it was dark blue or a black.

Q. Do you by any chance know the measurements of that yarmulke?

A. It's about five-and-a-half inches in diameter.

* * *

PLAINTIFF'S DEPOSITION EXHIBIT 1

DEPARTMENT OF THE AIR FORCE
Headquarters United States Air Force Regional Hospital
(SAC)
March Air Force Base, CA 92518

(Received June 26, 1981)

(SEAL)

REPLY TO ATTN. OF: SG/Stop 28

SUBJECT: Violation of AFR 35-10

TO: Captain S. Simcha Goldman/SGHMA

You are hereby informed that the wearing of the yarmulke is in violation of AFR 35-10, and you are ordered to refrain from wearing the yarmulke while in uniform.

/s/ Joseph E. Gregory
JOSEPH E. GREGORY, Colonel, USAF, MC
Commander

1st Ind/USAFRH/SGHMA

TO: USAFRH/SG

I acknowledge receipt of the above order on 23 June 81.

S. SIMCHA GOLDMAN, Capt, USAF, BSC
SSN 349-38-6833FV

2d Ind/USAFRH/SG 23 Jun 81

At 0915 hours, 23 June 1981, witnessed by Colonel Julius C. Archie, I gave Captain S. Simcha Goldman orders that the wearing of the yarmulke was in violation of AFR 35-10 and that he should refrain from wearing it with the uniform. He refused to sign acknowledgement of receiving the order and stated that he would not comply and that he would take this up with the press.

/s/ Joseph E. Gregory
JOSEPH E. GREGORY, Colonel, USAF, MC Commander

/s/ Julius C. Archie
Witness: JULIUS C. ARCHIE, Col, USAF, MS Administrator

Peace .... is our Profession

PLAINTIFF'S DEPOSITION EXHIBIT 2

DEPARTMENT OF THE AIR FORCE
Headquarters 220 Comsat Support Group SAC
March Air Force Base, CA 92518

(Received June 26, 1981)

(SEAL)

REPLY TO ATTN OF: CC

SUBJECT: Letter of Reprimand

TO: Captain S. Simcha Goldman

1. On 23 and 24 June 1981, you violated AFR 35-10 by wearing a yarmulke while in uniform. You were informed by the undersigned on 23 June both orally and in writing that such wear was in violation of AFR 35-10. I then told you to insure that you comply with AFR 35-10 and do not continue to wear the yarmulke in uniform.

2. You are hereby reprimanded for your misconduct. Your actions represent a flouting of military authority and will not be tolerated. I strongly recommend that you reevaluate your past conduct and take immediate steps to conform your behavior and performance to Air Force Standards.

/s/ Joseph E. Gregory

JOSEPH E. GREGORY, Colonel, USAF
Commander

PLAINTIFF'S DEPOSITION EXHIBIT 3

(Received June 26, 1981)

24 June 1981

Reply to Attn
Of: S. Simcha Goldman, Captain, USAF

Subject: Letter of Reprimand

To: USAF Hospital/CC

I respectfully request that the initiation of the Letter of Reprimand and any proceedings or action pursuant to it be delayed until 29 June 1981. The reason for this request is that my Attorney Captain Rex Hinesley is on leave and will not be back until 29 June 1981. I specifically request that he be present during the initiation of this Letter of Reprimand as I have already formed an attorney client relationship with him. Thank you for your consideration in this matter.

/s/ S. Simcha Goldman

S. SIMCHA GOLDMAN, Captain, USAF

PLAINTIFF'S DEPOSITION EXHIBIT 4

SPECIFIED PERIOD OF TIME CONTRACT (SPTC)
AUTHORITY: 10 U.S.C. 8012 and EO 9397.

PRINCIPAL PURPOSE: To enable you to apply for an extension of your date of separation by means of a Specified Period of Time Contract.

ROUTINE USES: Used by the approval authority to determine your eligibility for extension of your date of separation. Use of your SSAN is necessary to make positive identification of you and your records.

DISCLOSURE IS VOLUNTARY: Failure to provide the necessary information would result in your not being considered for extension of your date of separation. Failure to provide your SSAN would make it difficult to identify you and your records in processing the SPTC.

I. APPLICATION

1. TO:
   USAF Regional Hospital/SG, March AFB, CA
2. FROM: USAF Regional Hospital/SGHMA
   March AFB, CA 92518
3. DATE 11 May 1981
4. DAFSC 9186
5. SSAN 349-38-6833
6. CURRENT DOS 31 August 1981
7. In accordance with AFR 36-94, I request that my current DOS be extended to 31 August 1982 for the following reasons:

To have the opportunity to be considered for a Career Reserve appointment. Unforeseen circumstances prevented me from applying to the Career Reserve selection boards in November 1980 and April 1981. In August 1980, I had thyroid surgery. Post operative diagnosis was papillary

thyroid carcinoma. Three months of treatment by a nuclear medicine specialist followed. On 24 November 1980, I was found fit for active duty by an informal PEB and was notified of these results in December 1980 (see atch 1). An application to the November board could not be submitted prior to the PEB results. Moreover, since surgery, I have gone through an extended period of both objective and subjective distress with regard to my health. The discovery of cancer prompted a prolonged and serious evaluation of my life goals. This self-examination has extended beyond the deadline for submitting an application to the April 81 selection board.

8. I have not established a DOS under the 7-day option policy.

9. I have not declined Indefinite Reserve status or a Regular Air Force appointment.

10. I understand and agree to the following:

    a. This SPTC is subject to approval or disapproval by the designated authority in AFR 36-94. My current DOS may be extended until final action on this SPTC is taken by the designated authority.

    b. I may not withdraw or change this SPTC after it has been approved by the designated authority except as authorized in AFR 36-94.

    c. I accept the obligation to serve on active duty for the period of this SPTC, even though such period may exceed an active duty service commitment incurred by me under AFR 36-51.

    d. When required by law or policy, I may be involuntarily separated before the expiration of this SPTC.

11. TYPED NAME AND GRADE S. SIMCHA GOLDMAN, Captain

12. SIGNATURE /s/ S. Simcha Goldman

II. IMMEDIATE COMMANDER INDORSEMENT

13. TO: Hq SAC/SG, Offutt AFB, NE 68113

14. FROM: USAF Rgn Hosp/SG, March AFB, CA 92518

15. DATE 13 May 1981

16. RECOMMEND [X] APPROVAL [XX] DISAPPROVAL *See attachment 2

17. JUSTIFICATION I concur and support Captain Goldman's application for a new Specified Period of Time Contract. He has been an asset to our staff.

18. TYPED NAME, GRADE AND TITLE
JOSEPH E. GREGORY, Colonel, USAF, MC
Commander

19. SIGNATURE /s/ Joseph E. Gregory

III. ADDITIONAL INDORSEMENT (*When required*)

20. TO:

21. FROM

22. DATE

23. RECOMMEND [ ] APPROVAL
[ ] DISAPPROVAL

24. JUSTIFICATION

25. TYPED NAME, GRADE AND TITLE

26. SIGNATURE

IV. APPROVAL/DISAPPROVAL AUTHORITY

27. TO:

28. FROM:

29. DATE

30. FINAL ACTION [ ]APPROVED
[ ] DISAPPROVED

31. REASON FOR DISAPPROVAL

Attachment to AF Form 233—SPTC/Captain S. Simcha Goldman SSN 349-38-6833

Since 13 May 1981, a Letter of Reprimand for failure to follow an order has been added to Captain Goldman's Unfavorable Information File which had been generated by an OSI Investigation of AFR 30-30 violation. With a change in his general attitude, and because of this progression of events, I do not feel that Captain Goldman's continuation in the service is of any value to the United States Air Force. I, therefore, recommend disapproval of his request for extension of SPTC.

/s/ Joseph E. Gregory

JOSEPH E. GREGORY, Colonel, USAF, MC
Hospital Commander

PLAINTIFF'S DEPOSITION EXHIBIT 6

I. RATEE IDENTIFICATION DATA

(Read AFR 36-10 carefully before filling in any item)

1. NAME *(Last, First, Middle Initial)*
GOLDMAN, SIMCHA S.

2. Organization, Command, Location, PAS Code USAF Regional Hospital (SAC) March AFB, CA MDOSFD NY

3. SSN *(Include suffix)* 349-38-6833FV

4. PAFSC 9186

5. DAFSC 9186

6. ACTIVE DUTY GRADE Cpt

7. PERMANENT GRADE Cpt

8. PERIOD OF REPORT
FROM: 20 Jan 78
THRU: 19 Jan 79

9. DAYS OF SUPERVISION 365

10. REASON FOR REPORT Annual

II. JOB DESCRIPTION 1. DUTY TITLE: RGN HOSP, Clinical Psychologist

2. KEY DUTIES, TASKS AND RESPONSIBILITIES: Performs outpatient evaluations (self referrals, squadron referrals, legal evaluations, Temporary Disability Retirement List evaluations, security clearance evaluations), outpatient treatment, psychometric testing and interpretations, inpatient evaluation and treatment. Supervision of staff members, consultation to other health care practitioners.

III. PERFORMANCE FACTORS

1. *Specific example of performance required*

1. JOB KNOWLEDGE *(Depth, currency, breadth)*

Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [ ]; Well Above Standard [X]

Eagerly pursues new knowledge and continually adds to his repertories of skills and information. Demonstrates broad range of skill and expertise in dealing with patients.

2. JUDGMENT AND DECISIONS *(Consistent, accurate, effective)*

Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [ ]; Well Above Standard [X]

Has demonstrated an appropriate balance of independence and willingness to consult. Makes prompt and correct decisions under any circumstances. He is respected for his judgment and reliability.

3. PLAN AND ORGANIZE WORK *(Timely, creative)*
Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [X]; Well Above Standard [ ]

He sets priorities with appropriate flexibility. He organizes daily work in an efficient manner. He provides patients with enough time to identify their problems. He demonstrates both high level productivity and creativity.

4. MANAGEMENT OF RESOURCES *(Manpower and material)*

Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [ ]; Well Above Standard [X]

His judgment and zeal in this area have been valuable assets. Capt. Goldman demonstrates remarkable competence at resource management and maximally efficient utilization of manpower.

5. LEADERSHIP *(Initiative, accept responsibility)*

Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [X]; Well Above Standard [ ]

Has gone beyond expectations to provide training for other staff members. He unhesitatingly experiments with change, leads in innovation, offers new services to the military community, demonstrates sound judgment and foresight.

6. ADAPTABILITY TO STRESS *(Stable, flexible, dependable)*

Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [ ]; Well Above Standard [X]

Demonstrates extreme competence in managing emergency situations, has a calming effect on violent patients, successfully provides long hours of consultations and personal involvement. He deals effectively with stressful and dangerous situations.

7. ORAL COMMUNICATION *(Clear, concise, confident)*

Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [X]; Well Above Standard [ ]

Capt. Goldman speaks in easy to understand terms. His patients feel at ease with him as he talks to them in calm and concerned manner. He demonstrates a remarkable combination of assertiveness and confidence, yet gentleness and support.

8. WRITTEN COMMUNICATION *(Clear, concise, organized)*

Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [ ]; Well Above Standard [X]

Effectively conveys needed information while preserving confidentiality. His ideas are expressed in a concise, com-

prehensive manner. He possesses an ability to express his thoughts in written form.

9. PROFESSIONAL QUALITIES *(Attitude, dress, cooperation, bearing)*

Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [ ]; Well Above Standard [X]

Is highly respected for congenial attitude toward all personnel. He displays courtesy and respect toward patients, subordinates, and peers. He maintains appropriate military dress and bearing and the highest standards of professional ethics.

10. HUMAN RELATIONS *(Equal opportunity participation sensitivity)*

Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [ ]; Well Above Standard [X]

He actively supports equal opportunity programs. Is insightful and keenly aware of the pertinent issues. He is alert to problems and concerns pertaining to these issues which are presented by his associates and clientele.

IV. RECOMMENDED ASSIGNMENT INFORMATION

1. STRONGEST QUALIFICATION: Professional competence

2. SUGGESTED JOB ASSIGNMENT *(Include AFSC)*: Staff psychologist 9181

3. ORGANIZATION LEVEL: Regional Hospital

4. TIMING: 1979

V. EVALUATION OF POTENTIAL

Indicate your rating by placing an "X" in the designated portion of the appropriate block.

Lowest					*Highest*
[X[	[X[	[X]			
[ ][ ][ ]		[ ][ ][ ]			
Rater;	Addn Rater;	Indsr			
[ ][ ][ ]		[ ][ ][ ]			
Rater;	Addn Rater;	Indsr			
[ ][ ][ ]		[ ][ ][ ]			
Rater;	Addn Rater;	Indsr			

If Report is Abbreviated, "X" Appropriate Block

[ ] Report Closes Outside Cycle

[ ] Ratee Selected for Promotion

[ ] Ratee Retires/Separates Within 4 Months

[ ] Late to Reviewer [ ] Other *(Rater explain)*

VI. RATER COMMENTS

Capt. Goldman is a reliable and responsible officer whose productivity, cooperativeness, and creativity are clearly seen in his daily performance of duty. He has consistently demonstrated sincere concern for all patients as well as insight, compassion, talent, and sound judgment. He provides the highest quality service to patients in difficult psychiatric cases. He is obviously an asset to this department and to the hospital. He displays an extraordinary knowledge in his field coupled with confidence.

NAME, GRADE, BRANCH OF SVC, ORGN, LOCATION
FRANK R. YOUNG, Maj, USAF
USAF Regional Hospital (SAC)
March AFB, CA

DUTY TITLE RGN HOSP
Chief Mental Health Services

DATE 19 Jan 79

SSN *(Include suffix)* 465-74-2998FV

SIGNATURE /s/ Frank R. Young

VII. ADDITIONAL RATER COMMENTS

[X] CONCUR [ ] NONCONCUR

His maturity and integrity as a clinical psychologist are impressive. His pleasant and cooperative attitude is refreshing. He is a valuable member of our staff.

NAME, GRADE, BRANCH OF SVC, ORGN, LOCATION
WILLIAM E. MURRAY, Lt Col, USAF
USAF Regional Hospital (SAC)
March AFB, CA

DUTY TITLE RGN HOSP
Chairman Dept of Medicine

DATE 19 Jan 79

SSN *(Include suffix)* 240-32-5956FV

SIGNATURE

VII. INDORSER COMMENTS

[X] CONCUR [ ] NONCONCUR

Capt. Goldman's contribution to this hospital and the Air Force is well documented in this report. I am in complete agreement with this evaluation.

REVIEW GROUP SIZE

NO. OF (1S), (2S), (3S), (4S), (5S), (6S)

NAME, GRADE, BRANCH OF SVC, ORGN, LOCATION
LAWRENCE R. SMITH, Col, USAF
USAF Regional Hospital (SAC)
March AFB, CA

DUTY TITLE RGN HOSP, Commander

DATE 19 Jan 79

SSN *(Include suffix)* 056-32-8225FR

SIGNATURE

PLAINTIFF'S DEPOSITION EXHIBIT 9

I. RATEE IDENTIFICATION DATA

1. NAME *(Last, First, Middle Initial)*
Goldman, S. Simcha

2. SSAN *(Include Suffix)* 349-38-6833FV

3. GRADE Captain

4. DAFSC 9186

5. ORGANIZATION, COMMAND, LOCATION
USAF Regional Hospital (SAC), March AFB, CA

6. PAS CODE MDOSFDNY

7. PERIOD OF REPORT
FROM: 1 May 80 THRU: 15 Sep 80

8. NO. DAYS OF SUPERVISION 138

9. REASON FOR REPORT CRO

II. JOB DESCRIPTION

1. DUTY TITLE: RGN HOSPITAL, Clinical Psychologist

2. KEY DUTIES, TASKS AND RESPONSIBILITIES:

Administers and evaluates psychological tests. Trains and supervises technicians in administration of these tests. Provides psychotherapy, mental health evaluations, and consultations to other medical sources.

III. PERFORMANCE FACTORS

1 *Specific example of performance required*

1. JOB KNOWLEDGE *(Depth, currency, breadth)*
Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [ ]; Well Above Standard [X]

Captain Goldman is a very well trained clinical psychologist who applies his knowledge and experience in an exceptionally fine manner. He actively pursues continuing education through current literature and other methods.

2. JUDGMENT AND DECISIONS *(Consistent, accurate, effective)*

Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [ ]; Well Above Standard [X]

Demonstrates excellent judgment and maturity. He consistently makes good assessment and disposition regarding a broad range of mental health problems.

3. PLAN AND ORGANIZE WORK *(Timely, creative)*

Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [ ]; Well Above Standard [X]

His work is well organized and planned in a timely fashion to meet the numerous responsibilities of a clinical psychologist.

4. MANAGEMENT OF RESOURCES *(Manpower and material)*

Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [ ]; Well Above Standard [X]

Manpower and materials are managed very effectively. He is careful in his use of resources to maximize the benefit of both the patient and the Air Force.

5. LEADERSHIP *(Initiative, accept responsibility)*
Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [ ]; Well Above Standard [X]

Shows a high degree of motivation and initiative. Not only does Captain Goldman accept responsibility, he actively seeks additional duties and positions of leadership.

6. ADAPTABILITY TO STRESS *(Stable, flexible, dependable)*

Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [ ]; Well Above Standard [X]

Captain Goldman possesses the ability to deal with stressful situations in an efficient, calm and expeditious manner.

7. ORAL COMMUNICATION *(Clear, concise, confident)*

Not observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [ ]; Well Above Standard [X]

Communicating effectively and confidently has made him a good participant in discussion groups.

8. WRITTEN COMMUNICATION *(Clear, concise, organized)*

Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [ ]; Well Above Standard [X]

His reports are composed in a concise, organized manner with clarity.

9. PROFESSIONAL QUALITIES *(Attitude, dress, cooperation, bearing)*

Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [ ]; Well Above Standard [X]

Captain Goldman is very professional in clinical settings and in his interactions with other professional and technical personnel. Attitude and bearing are excellent and he is a credit to the Air Force.

10. HUMAN RELATIONS *(Equal opportunity participation, sensitivity)*

Not Observed or Not Relevant; Far Below Standard [ ]; Below Standard [ ]; Meets Standard [ ]; Above Standard [ ]; Well Above Standard [X]

Demonstrates support of the Equal Opportunity Program and awareness and sensitivity to all ethnic groups.

IV. ASSIGNMENT RECOMMENDATION:

1. STRONGEST QUALIFICATION: Administrative and clinical skills
2. SUGGESTED JOB *(Include AFSC):* Clinical Psychologist-Administrative Role, 9186
3. ORGANIZATION LEVEL: Regional Hospital
4. TIMING: 1980

V. EVALUATION OF POTENTIAL:

Compare the ratee's capability to assume increased responsibility with that of other officers whom you know in the same grade. Indicate your rating by placing an "X" in the designated portion of the most appropriate block.

	[X]	[X]	[X]
Lowest			*Highest*
	[ ]	[ ]	[ ]
	Rater	Addn Rater	Indorser
	[ ]	[ ]	[ ]
	Rater	Addn Rater	Indorser
	[ ]	[ ]	[ ]
	Rater	Addn Rater	Indorser

VI. RATER COMMENTS

Captain Goldman is an essential member of the professional staff. The Air Force is a more effective organization because of the care provided to active duty, retired and dependent personnel. His expertise, enthusiasm and productivity have contributed immensely to making Mental Health the excellent department that it is. His initiative and leadership are noteworthy and the high professional and military standards he has achieved deserve recognition. Promotion is strongly supported without reservation.

NAME, GRADE, BR OF SVC, ORGN, COMD, LOCATION
WILLIAM E. MURRAY, Lt Colonel, USAF
USAF Regional Hospital (SAC)
March AFB, CA

DUTY TITLE Chairman Dept of Medicine

DATE 20 Oct 80

SSAN 240-32-5956FV

SIGNATURE /s/ William E. Murray

VII. ADDITIONAL RATER COMMENTS

[X] CONCUR [ ] NONCONCUR

Captain Goldman has performed exceptionally well as senior clinical psychologist and Chief of Psychological Services. His clinical skills were vital to the operation of the mental health function during part of this reporting period when no psychiatrist was assigned. This highly motivated individual has been essential in providing individual and group psychotherapy. He is an expert in performance and interpretation of psychological tests. Capt. Goldman has significantly increased his knowledge of Air Force Regulations that pertain to mental health and the disposition of patients. Valuable suggestions have been made and he has done an excellent job of supervising/training technicians. Promotion to Major is strongly recommended.

NAME, GRADE, BR OF SVC, ORGN, COMD, LOCATION
EDWARD H. PARKER, JR., Colonel, USAF
USAF Regional Hospital (SAC)
March AFB, CA

DUTY TITLE Chairman Dept of Med/Radiology

DATE 20 Oct 80

SSAN 546-50-9095FR

SIGNATURE /s/ Edward H. Parker, Jr.

VIII. INDORSER COMMENTS

[X] CONCUR [ ] NONCONCUR

Captain Goldman is an extremely competent clinical psychologist. He has demonstrated superb professional knowledge in the interpretation of psychological tests. Captain Goldman is truly an asset to his profession, this hospital and the United States Air Force. Promotion is strongly recommended.

NAME, GRADE, BR OF SVC, ORGN, COMD, LOCATION
LARRY L. CONRAD, Colonel, USAF
USAF Regional Hospital (SAC)
March AFB, CA

DUTY TITLE Director, Hospital Services

DATE 22 Oct 80

SSAN 315-38-4820FR

SIGNATURE /s/ Larry L. Conrad

PLAINTIFF'S TRIAL EXHIBIT 6

A GUIDE TO JEWISH RELIGIOUS PRACTICE
BY ISAAC KLEIN

THE JEWISH THEOLOGICAL SEMINARY
OF AMERICA
NEW YORK 1979

A GUIDE TO JEWISH RELIGIOUS PRACTICE

This volume is a detailed and comprehensive guide to Jewish practice for home and synagogue, written in the spirit of the Conservative movement.

The compilation is the result of a project conceived in 1960 by Dr. Louis Finkelstein, then Chancellor of the Jewish Theological Seminary, the purpose of which was to produce authoritative halakhic studies for the training of conservative rabbis. Rabbi Isaac Klein, a leading authority on Jewish law, accepted the task and produced a series of pamphlets on Jewish law and practice.

Before long, a widespread demand for access to this invaluable material developed beyond the walls of the Seminary. To answer this demand, and to provide lay members of the Conservative movement with a reliable guide to Jewish practice, these pamphlets, extensively revised and updated by Rabbi Klein, have now been gathered together in a single volume.

The many subjects treated in the volume are discussed in the light of traditional Jewish sources (Bible, Talmud, Codes, Responsa, etc.), and are fully referenced for authentication and further study. The topics covered include virtually everything that might be of interest to the modern Jew: the laws of kashrut and how to keep a kosher home; the meaning and significance of the holidays and how to observe them at home and in the synagogue; laws governing such key life events as marriage, divorce, birth,

adoption, conversion, death, and many others. In addition, the volume includes full dscussions, from the Jewish point of view, of such pressing issues of current concern as euthanasia, organ transplantation, abortion, autopsy, artificial insemination and women's rights. Also included are relevant decisions of the Committee on Jewish Law and Standards of the Rabbinical Assembly.

* * *

DAILY PRAYER 51

In our day of the Mezuzah has become a means of Jewish identification and a symbol of Jewish unity and solidarity all over the world (see Landau, *Tselota d'Avraham,* p. 632).

7. Covering the Head

The theoretical approach to the regulations regarding the covering of the head will lead us into a controversial field. There are sources that make covering the head by a Jewish male a special practice of the pious, [Hebrew words omitted in printing], and there are sources indicating that it is mandatory for all. There are also differing opinions regarding when the custom started and how widespread it was. Proof is brought that in some countries the custom was unknown, while in others it was limited to the times when one was occupied with the performance of sacred acts, such as prayer, the study of sacred literature, or the performance of a religious ritual (see Krauss, "Covering the Head"; Lauterbach, "Worshipping with Covered Heads," in Schwartz, *Responsa of the CCAR,* pp. 208-218, reprinted in Lauterbach, *Studies in Jewish Law, Custom, and Folklore,* pp. 225 ff.; Eisenstein, *Otsar Dinim Uminhagim,* s.v., *Gilui Rosh; Encyclopedia Talmudit,* s.v. *Gilui Rosh.*)

Of one thing we can be sure, however; in the generations preceding ours, the general practice among traditional Jews was to have the head covered at all times.

The reasons given were twofold. First, it was the Jewish way of showing reverence and respect (B. *Qid.* 31a; Maimonides, *Hil. De'ot* 5:6). Secondly, uncovering the head was the custom of the Gentiles; hence, it must be avoided by Jews (see *Encyclopedia Talmudit,* 6:117). Covering the head thus served as a means of identification and a barrier against assimilation.

While the practice was uniform in the generations preceding ours, it now runs the gamut from those Orthodox who retain the old practice of having the head covered at all times to those Reform who discard the custom entirely.

Our practice should be—

a. To cover the head when in the sanctuary of a synagogue (see *O.H.* 91 in *M.A.* 3 and *Peri Megadim,* and in *Eishel Avraham,* ibid., n. 3).

b. To cover the head when praying and when studying or reading from our sacred literature (*O.H.* 282:3).

c. To cover the head when performing a ritual.

d. To cover the head when eating, since eating is preceded and followed by a benediction. (Some follow the custom of certain Jewish communities in Germany and cover their heads during the benedictions before and after the meal but not during the meal itself.)

PLAINTIFF'S TRIAL EXHIBIT 7

Captain Howard Rosman, 097-36-9303 8 July 1974
Military Attire
SG/CC
CSG/CC
IN TURN

1. Request a waiver pertaining to para 1-12b(1), AFM 35-10 which prohibits ornaments on the head while performing duties or in uniform.

2. The reason for this request is that I am a member of the orthodox branch of the Jewish religion. In this religion my head is required to be covered at all times. Request permission to wear a skullcap indoors while performing assigned duties in order to comply with my religious beliefs. My primary duties consist of examination, diagnosis, and treatment of injuries and disease of infants and children.

3. Wearing the service cap, flight cap, or other military headgear out of doors (which I will) pose no problem in as much my head will be covered with them. However, being indoors without a cap does bring about a conflict between my religious beliefs and existing USAF regulations.

/s/ Howard Rosman

HOWARD ROSMAN, Captain, USAF, MC
USAF Hospital, Pease

PLAINTIFF'S TRIAL EXHIBIT 8

SG/CC 9 July 1974

Waiver of Military Attire Requirements
CSG/CC
BW/CC
IN TURN

1. Recommend approval.

2. I have personally interviewed Captain Rosman and find him sincere in his beliefs. This interview also indicated the presence of this belief and adherence to its practice for several years prior to his entering active duty. His belief does not preclude military service which he is doing voluntarily.

3. Because of the criticality of physician manning I am permitting Captain Rosman to continue the wear of the skullcap until finalization of this waiver request as per para 1-3, AFM 35-10. The skullcap in question is small, black, blends in with his hair contour and, indeed, is not noticeable. It does not detract from his appearance, the wear of the uniform, or reflect unfavorably upon his duty or the United States Air Force.

/s/ Frank E. Edmunds, Jr.
FRANK E. EDMUNDS, JR., Colonel, USAF, MC
Commander

1 Atch
Ltr, Dr. Rosman
Cy to: Dr. Rosman

PLAINTIFF'S TRIAL EXHIBIT 9

CC 22 July 1974

Waiver of Military Attire Requirements
SG/CC
Captain Rosman
(In Turn)

1. Reference is made to your letter, dated 8 July 1974, requesting permission to wear a skullcap indoors while performing assigned military duties in uniform. I have con-

sidered the matters presented in your letter, together with those discussed in our meeting of 16 July 1974, and your request is hereby denied.

2. In accordance with the above action, you are hereby directed to perform your military duties as assigned in proper uniform and to refrain from wearing a skullcap anytime while in uniform except during formal religious services, or when outside with the skullcap completely covered by military headgear worn as prescribed in AFM 35-10.

3. You will acknowledge your receipt and understanding of this communication by dated indorsement to SG/CC.

/s/ Richard A. Burpee

RICHARD A. BURPEE, Colonel, USAF
Commander

1st Ind 23 July 1974

Captain Howard Rosman, USAF Hospital, Pease

TO: SG

Receipt Acknowledged.

/s/ Howard Rosman July 23, 1974
HOWARD ROSMAN, Captain, USAF, MC
097-36-9303FV

PLAINTIFF'S TRIAL EXHIBIT 10

Law Offices
MILLER, CASSIDY, LARROCA & LEWIN,
1320 19th Street, N.W. - Suite 500
Washington, D. C. 20036

Area Code 202
Telephone 293-6400

Herbert J. Miller, Jr.
John Joseph Cassidy
Raymond G. Larroca
Nathan Lewin
Martin D. Minsker
William H. Jeffress, Jr.
Thomas D. Rowe, Jr.
A. Raymond Randolph, Jr.
R. Stan Mortenson

Joseph S. McCarthy
Courtney A. Evans
of Counsel

July 25, 1974
HAND DELIVERED

David R. Johnson, Esq.
Office of the General Counsel
Department of the Air Force
Pentagon
Room 4E985
Washington, D. C. 20330

Subject: Captain Howard Joseph Rosman

Dear Mr. Johnson:

Pursuant to our telephone conversation of today, I am hand-delivering this letter to your office to detail the facts regarding Captain Howard Joseph Rosman, who is presently stationed at Pease Air Force Base, in Portsmouth, New Hampshire, and to describe the background of the incident which gives rise to our contention, which we are prepared to take to federal district court, that religious discrimination is being practiced against him.

1. Captain Rosman is a medical doctor, with a specialty in pediatrics. He entered on active duty in the Air Force as of July 1, 1974. His initial assignment was Andrews Air Force Base, but he was reassigned sometime prior to April of this year to Pease Air Force Base, on the stated ground that he did not have any subspecialty in pediatrics.

2. Captain Rosman arrived at Pease Air Force Base in late April or early May of this year for a preliminary tour of the Base. He was shown around the hospital and the Base by one Major Jonas. At that time, Capt. Rosman was wearing civilian clothes and, during his visit to the Base, he wore his skullcap at all times.

David R. Johnson, Esq.
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3. Capt. Rosman is a strictly observant Orthodox Jew. One of the observances he follows with precision — and has done so all his life — involves the wearing of a covering on his head at all times. During his medical studies at New York University, and thereafter while he was an intern and resident at the Bellevue Hospital Center in New York City, Capt. Rosman consistently followed this practice without encountering any opposition or question.

4. Prior to his service in the Air Force, Capt. Rosman worked, on two occasions, for the federal government. In 1970 he was employed at the United States Public Health Service Hospital in Staten Island, and during the summer of 1968 he was employed at the National Institutes of Health in Bethesda. On both those occasions, Capt. Rosman wore his skullcap in the hospital and in the federal installation without any controversy or question being raised about it.

5. Capt. Rosman arrived for duty at Pease Air Force Base on July 1 of this year. He was then wearing civilian clothes. On his first day at the Base, Capt. Rosman was told by Major Jonas that the skullcap "would have to go," because it would not be possible for him to

combine civilian and military clothes. Major Jonas suggested that one possibility, however, was to get a waiver of the uniform regulation (which I am told is found at Air Force Manual 35-10, prohibiting the wearing of any ornamentation on the head with a military uniform).

6. Capt. Rosman immediately requested the waiver in writing. This was done on July 8. That request was endorsed by the commanding officer at the hospital, Colonel Frank E. Edmonds. Col. Edmonds noted on his endorsement that the skullcap was small, black, that it blended with Capt. Rosman's hair, that it was hardly noticeable on his head, and that it in no way interfered with proper discipline.

7. The request went to the commanding officer of the Base, Colonel Richard Burpee. Col. Burpee had a personal meeting with Capt. Rosman, in which Capt. Rosman explained

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to him his deep religious conviction and his feeling that it was necessary on religious grounds for him, at all times, to wear a covering on his head.

8. On July 23, 1974, Col. Burpee rejected the request for a waiver without stating any reason. He gave Capt. Rosman a written order to remove his skullcap and not to wear it while performing any military duties and while in uniform. The written order stated that Capt. Rosman could wear the skullcap only at formal religious services or when he is outdoors and the skullcap is "completely covered by military headgear." (Obviously, this last exception is totally meaningless since there is no re-

ligious requirement that Capt. Rosman wear *two* coverings on his head). In Capt. Rosman's personal meeting with Col. Burpee, the Colonel explained that he had sworn to uphold the Air Force regulations and if those regulations conflict with religious requirements, he is obliged to follow the regulations.

9. While we do not question Col. Burpee's good faith, it is clear to me — and I submit, it would be clear to any federal court — that the Colonel misunderstands his function. He is also sworn to uphold the Constitution of the United States, which includes, in the First Amendment, a guarantee for the free exercise of religion. There are numerous court decisions which require accommodation to religious practices in these circumstances. See, *e.g., Sherbert* v. *Verner,* 374 U.S. 398 (1963); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972); *Riley* v. *Bendix Corp.,* 464 F.2d 1113 (5th Cir. 1972). Moreover, the Air Force is obliged in this case not merely to follow the general directive of the First Amendment but it is subject, pursuant to 42 U.S.C. § 2000e-16(a), to the obligations of the Civil Rights Act. That Act specifically directs, in 42 U.S.C. § 2000e(j), that the prohibition against discrimination on account of religion includes "*all aspects* of religious observance and practice." See also 5 C.F.R. § 713.204(g).

I have no doubt whatever that if a civil action were instituted by Capt. Rosman the Air Force regulation regarding

ornamentation on one's head would be overriden by the constitutional command of the First Amendment and by the statutory obligation to accommodate to religious practices. I ask you to please convey this information immediately to Col. Burpee so that this small matter not be amplified into a major case that would bring disrepute upon the military service. Since Capt. Rosman is presently under an order which deprives him of the right to practice his religion, every day and every hour increases the constitutional violation. The matter is of the greatest urgency.

Sincerely yours,
/s/ NATHAN LEWIN

NL:pf

cc: Deputy Assistant Secretary for Equal Opportunity
Room 3B938
Department of Defense

General Counsel
Room 3E980
Department of Defense

Chairman, Civil Service Commission

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1552

S. SIMCHA GOLDMAN,

plaintiff,

v.

SECRETARY OF DEFENSE, *ET AL.*,

defendants,

AFFIDAVIT

I am Donald Dale Reeves, Chaplain, Captain, USAF, SSAN 411-64-9822. I was ordained by the Cumberland Presbyterian Church at Troy, Tennessee, in the year 1961.

My educational background is as follows: Troy High School, Troy, Tennessee, diploma, 1957; Bethel College, McKenzie, Tennessee, B.A., majors—English, Bible, 1961; Vanderbilt University Divinity School, Nashville, Tennessee, M. Div., 1967; Vanderbilt Graduate School of Management, Nashville, Tennessee, postgraduate work, non-degree, 1973.

My vocational experience is as follows:

Teacher: 1962-63, Mt. Juliet High School, Mt. Juliet, Tennessee, duty—English instructor; summer 1965-66, Peabody College Demonstration High School, Nashville, Tennessee, duty—English instructor; 1966-67, Sparta-White County High School, Sparta, Tennessee, duty—English instructor.

Associate Pastor: 1967-68, First Presbyterian Church, Nashville, Tennessee, duties—planner/administration of total Christian education program.

Pastor: 1968-70, First Cumberland Presbyterian Church, Jackson, Tennessee, duties—preaching, administration, counseling.

Psychiatric Hospital Chaplain, 1971-73, Western State Psychiatric Hospital, Bolivar, Tennessee, duties—therapeutic counseling/program administration.

Presbyterial Executive: 1974-77, Murfreesboro Presbytery of the Cumberland Presbyterian Church, Murfreesboro, Tennessee, duties—executive administration of the Presbytery's total programming for its 50 churches.

Writer:

Feature articles: *The Nashville Tennessean,* 19 December 1971; *Progressive Farmer,* March 1973; *The Cumberland Presbyterian,* varied issues over past 20 years.

Church School curricula (adults, youth, children), *United Methodist Publishing House,* 1976-77.

Biweekly feature column: *The Cumberland Presbyterian,* 1978-present.

I have been a Chaplain in the United States Air Force since September 1977. My duty assignments have been:

Offutt Air Force Base, Nebraska, September 1977-June 1980, duties—Staff Chaplain, preaching, counseling, program planning/administration.

King Salmon Air Force Station, Alaska, June 1980-January 1981, duties—Installation Chaplain, total chapel program planning/administration, preaching, counseling.

Maxwell Air Force Base, Alabama, February 1981-present, duties—researcher/writer/resource person for the Chief of Chaplains.

I have undertaken a study of the religious dress requirements/customs of various religious bodies in the United States, particularly as they are related to the wear of the military uniform. The results of my research are at Attachment 1.

/s/ DONALD DALE REEVES
DONALD DALE REEVES
Chaplain, Captain, USAF

1 Atch
Research Data, 11 pp

Subscribed and sworn to before me this 31st day of August, 1981.

/s/ RUTH W. PIERCE

DEFENDANTS' TRIAL EXHIBIT 1

RESEARCH DATA ON RELIGIOUS REQUIREMENTS AND PRACTICES

(Special Interest: Dress/Uniform Codes)

The following charts delineate the uniform and religious dress customs, codes, and requirements of a variety of religious bodies in the United States.

For the sake of order, they are divided into seven denomination/group headings: Christian Heritage Groups, Indian Heritage Groups, Islamic Groups, Japanese Heritage Groups, Jewish Groups, Sikh Groups, and "Other" Groups.

These headings and the bulk of the related information has been gleaned from a study entitled *Religious Requirements and Practices: A Handbook For Chaplains,* which was done for the U. S. Army in April, 1978 (Pamphlet No. 165-13) and revised in April, 1980 (Pamphlet No. 165-13-1). Contractor for this research was Kirschner Associates, Inc., with subcontract work done by The Institute for the Study of American Religion.

This study is denoted on the charts under the column, "Other Printed Information", as DA——; and other reference works consulted are denoted by author, with complete publication data on the Bibliography Sheet.

Original sources of the study are denoted under the column "Original Source of Information" and often show symbols as follows:

(A)=Approved in final draft form by this individual/agency;

(C)=Consulted but did not see the final draft.

CHRISTIAN HERITAGE GROUPS

Denomination/Group	Special Dress/Uniform Requirement(s)	Original Source of Information	Other Printed Information
Berkeley Christian Coalition	None	Denominational Staff Member (A)	DA 165-13: I-7, A-1
The Children of God	None	Denominational Information Officer (A)	DA 165-13: I-14, A-1; Rudin, p. 74-82; Whalen, p. 91.
The Church of Christ Scientist	None	Denominational Staff Member (A)	DA 165-13: I-20, A-1; Boa, p. 81ff; Mead, p. 81ff.
Church of Jesus Christ of Latter Day Saints	Generally none. But specially, "covenanted" members are allowed to wear their "temple garments" under military or civilian clothing.	Counselor to the President of the Church (A)	DA 165-13: I-26, A-1; Boa, p. 64ff; Mead, p. 91ff.
The Foundation Faith of God	None	Denomination Member	DA 165-13-1: I-17.
General Conference of Seventh-Day Adventists	None	Denominational Staff Member (A)	DA 165-13: I-31, A-1; Boa, p. 90ff; Mead, p. 20ff.
Holy Order of MANS	Clerical clothes are worn by all members from earliest stages of training.	Denominational Official (A)	DA 165-13: I-37, A-1.
Holy Spirit Association for the Unification of World Christianity (Moonies)	None	Denominational Staff Member (A)	DA 165-13: I-43, A-1; Boa, p. 167ff; Rudin, p. 31-45; Whalen, p. 47ff.

CHRISTIAN HERITAGE GROUPS (cont'd)

Denomination/Group	Special Dress/Uniform Requirement(s)	Original Source of Information	Other Printed Information
International Christian Ministries	None	Denominational Chaplain (Non-military) (A)	DA 165-13: I-48, A-2.
The Mennonite Church	None	Denominational General Secretary (A)	DA 165-13: I-52, A-2; Mead, p. 167ff.
Religious Society of Friends	None	Denominational General Secretary (A)	DA 165-13: I-59, A-2; Mead, p. 133ff.
The Reorganized Church of Jesus Christ of Latter Day Saints	None	Chairman, Denominational Committee on Ministry to Armed Forces (A)	DA 165-13: I-65, A-2; Mead, p. 95.
Watchtower Bible & Tract Society (Jehovah's Witnesses)	None	Denominational Vice-President (A)	DA 165-13: I-71, A-2; Boa, p. 73ff; Mead, p. 20; Whalen, p. 13ff.
The WAY International	None	Director, Denominational Public Information Office (A)	DA 165-13-1: I-43, A-1; Boa, p. 196ff; Rudin, p. 54-58; Whalen, p. 97.
The Worldwide Church of God	None	Minister of the Denomination (A)	DA 165-13: I-78, A-2; Whalen, p. 28ff.

INDIAN HERITAGE GROUPS

Denomination/Group	Special Dress/Uniform Requirement(s)	Original Source of Information	Other Printed Information
Divine Light Mission	None	Denominational Public Information Department Staff Member (A)	DA 165-13: II-8, A-2; Boa, p. 188ff; Rudin, p. 62-68; Whalen, p. 102ff.
The International Society For Krishna Consciousness (Hare Krishna)	Males wear a tuft of hair *(sikh)* and usually no more than a month's growth of hair. After bathing, telok or clay markings decorate the body in twelve places. Two white parallel lines on the forehead which come to a V-shaped point at the bridge of the nose are the most noticeable of these markings.	Denominational Regional Secretary (A)	DA 165-13: II-14, A-2; Boa, p. 178ff; Petersen, p. 139ff; Rudin, p. 45-54; Whalen, p. 84ff.
Satchidananda Ashram-Integral Yoga	Members of the Sannyas Order (Monkhood) wear the saffron robe. Other members wear simple white clothing. *(Note:* Information incomplete as to whether or not these modes of dress are optional when military service is entered. But military service *is* allowed by denominational standards.)	Publications Editor (A)	DA 165-13-1; II-15, A-1.

INDIAN HERITAGE GROUPS (cont'd)

Denomination/Group	Special Dress/Uniform Requirement(s)	Original Source of Information	Other Printed Information
Sri Chinmoy Centre	Members are "expected" to wear white garments during meditation. Meditation is required in morning and evening. *(Note:* "Spiritual Directives", whether received externally from ones religious superior or internally during meditation, must be obeyed and supercedes any military directives.)	Denominational Information Coordinator (A)	DA 165-13-1; II-19-23, . .-1.
World Plan Executive Council (Transcendental Meditation)	None	National Staff Member (A)	DA 165-13: II-19, A-2; Boa, p. 156ff; Needleman, p. 132ff; Petersen, p. 160; Whalen, p. 75ff.

ISLAMIC GROUPS

Denomination/Group	Special Dress/Uniform Requirement(s)	Original Source of Information	Other Printed Information
Hanafi Madh-Hab Center (Hanafi Muslim Movement)	Females must be covered from head to toe. Hands may show. Loose-fitting garments must be worn. Both males & females must have heads covered when praying, eating, and at all other times (except when retiring to bed).	Denominational Leader (A)	DA 165-13-1: III-7-12; Boa, p. 49ff.
The Islamic Center (Orthodox Islam)	None	Denominational Official (C)	DA 165-13-1: III-16, A-1.
The Sufi Order	None	Denominational Staff Member (A)	DA 165-13: III-11, A-2.
World Community of Islam In the West	Males are forbidden to wear clothes which show the print of the body. Females may show only the face, hands, and below the ankles.	Denominational Official (C)	DA 165-13: III-18, A-2; Mead, p. 60ff, 189ff.

JAPANESE HERITAGE GROUPS

Denomination/Group	Special Dress/Uniform Requirement(s)	Original Source of Information	Other Printed Information
Buddhist Churches of America	None. But members are encouraged to carry Buddhist rosary at all times.	Presiding Bishop (A)	DA 165-13: IV-8, A-2.
Church of Perfect Liberty	An amulet (ring or pendant) must be worn at all times. Perfect Liberty badge is worn on outer garment over the heart by most members. (This is not required but is "encouraged".)	Denominational Official (A)	DA 165-13: IV-14, A-3.
Nichiren Shoshu Academy	None. However, the carrying of a scroll and prayer beads inside or underneath their clothing during military action is "approved".	Denominational Executive Secretary (A)	DA 165-13: IV-19, A-3.
Zen Center of Rochester	All members are asked to wear robes of uniform color & style during group "sittings". (Note: "Sittings"—i.e. group worship —are strongly encouraged but are not required.)	Denominational Leader (A)	DA 165-13: IV-15-20, A-2; Needleman, p. 38ff.

JEWISH GROUPS

Denomination/Group	Special Dress/Uniform Requirement(s)	Original Source of Information	Other Printed Information
Black Hebrew Israelite Nation	None	Anonymous Member (C)	DA 165-13: V-5, A-3; Mead, p. 154.
Conservative Judaism	None	Member of the Rabbinical Assembly (A)	DA 165-13: V-10, A-3; Boa, p. 57ff; Mead, p. 153.
Orthodox Judaism	Incomplete Information. Group Worship is "required". There are "fixed times" for public worship, three times daily: morning, afternoon and evening. If the required number for a "congregation" are not present, "individuals must privately worship." The "minimum equipment" listed as necessary for worship are: Torah or Scroll of the Law and its accouterments, prayer books, Hebrew Bible, skullcaps, prayer shawls, and tfilin (phylacteries), which are to be worn by males at morning prayer (except on the Sabbath). During worship, male	Member of the Rabbinical Council of America (A)	DA 165-13: V-13-18, A-3; Boa, p. 57ff; Mead, p. 152. Rosenzweig p. 71ff; Siegel, p. 49.

JEWISH GROUPS (Cont'd)

Denomination/Group	Special Dress/Uniform Requirement(s)	Original Source of Information	Other Printed Information
	Jews are "required" to keep their heads covered.		
Reconstructionist Jews	Head must be covered when engaged in prayer. Group worship is required. There are "set times for daily, Sabbath and festival services, and Reconstructionist Jews are expected to attend and participate. In the absence of congregational worship services, every Jew can pray privately at his home or wherever he may be."	Member of the Jewish Reconstructionist Foundation (A)	DA 165-13: V-23, A-3; Mead, p. 154.
Reform Jews	None	Director of Rabbinic Placement (A)	DA 165-13: V-28, A-3; Boa, p. 57ff; Mead, p. 152ff.

SIKH GROUPS

Denomination/Group	Special Dress/Uniform Requirement(s)	Original Source of Information	Other Printed Information
Eckankar	None	Denominational Official (A)	DA 165-13-1: VI-6, A-2.
Health, Happy, Holy Organization	All practicing Sikhs must keep their hair (including beards) uncut and turban-tied on top of the head. Also required are: a special underwear, a steel bracelet, and dagger. Official ministers wear a long, hemmed skirt and jodhpur-like pants.	Denominational Official (A)	DA 165-13: VI-1-12, A-3; Boa, 22ff.
Sikh Dharma	Same as above	Same official as above (A)	Same as above

OTHER GROUPS

Denomination/Group	Special Dress/Uniform Requirement(s)	Original Source of Information	Other Printed Information
American Council of Witches	None	High Priest (A)	DA 165-13: VII-7, A-3; Petersen, p. 62ff.
Baha'i Faith	None	Denominational Staff Member (A)	DA 165-13: VII-14, A-3; Mead, p. 32; Petersen, p. 181.
Church of Satan	None	Minister of Information (A)	DA 165-13: VII-19, A-4; Boa, p. 110ff; Petersen, p. 75.
Church of Scientology	None	Denominational Staff Member (A)	DA 165-13: VII-25, A-4; Petersen, p. 87; Whalen, p. 47ff.
The Foundation Faith of The Millenium	None	Denominational Official (A)	DA 165-13: VII-32, A-4.
Gardnerian Wicca	None	Denominational Official (A)	DA 165-13: VII-38, A-4; Boa, p. 110ff; Petersen, p. 62.
The International Church of Ageless Wisdom, Inc.	None	Denominational Official (A)	DA 165-13-1: VII-18, A-2.
Native American Church	None	Denominational Member (C)	DA 165-13: VII-44, A-4.

OTHER GROUPS (cont'd)

Denomination/Group	Special Dress/Uniform Requirement(s)	Original Source of Information	Other Printed Information
Rastafarians	Females must wear skirts or dresses (no pants) and keep head covered in public.	Personal contact with individual members in Jamaica.	DA 165-13-1: VII-29-33; Berrett; Owens.
Universal Church of the Master	None	Denominational Official (C)	DA 165-13-1: VII-37, A-2; Boa, p. 130ff; Mead, p. 234ff; Petersen, p. 47ff.
Universal Life Church	None	Denominational Official (A)	DA 165-13: VII-49, A-4.

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253

THE CONCISE CODE OF JEWISH LAW

VOLUME ONE

A GUIDE TO PRAYER AND RELIGIOUS OBSERVANCE IN THE DAILY LIFE OF THE JEW

THE CONCISE CODE OF JEWISH LAW

COMPILED FROM
KITZUR SHULHAN ARUCH AND
TRADITIONAL SOURCES

A NEW TRANSLATION WITH INTRODUCTION
AND HALACHIC ANNOTATIONS
BASED ON
CONTEMPORARY RESPONSA

by

RABBI GERSION APPEL

VOLUME ONE

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* * *

he should wipe his hands with some material, and conclude the benediction with "the cleansing of the hands" (Hebrew words omitted in printing). Afterwards, when he obtains water, he should wash his hands without a benediction.

3. Washing of the hands is required on awakening from sleep,[3] after defecating or urinating, after a bath,[4] after cutting one's nails or hair, after taking off one's shoes, after attending a funeral, or upon leaving the house where a corpse lay, and after touching anything unclean or any private part of the body that is generally covered.

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3. *Dressing Before Washing Hands* Where possible one should endeavor to wash his hands upon arising in the morning before putting on his clothing. However, where this is not practicable, one may dress himself before washing his hands.

4. *Washing the Hands in the Bathroom* A bathroom, with modern toilet facilities where the waste matter is flushed away and the room is used for other purposes as well, is nowadays considered to be like the anteroom of a bathhouse. One need not wash his hands upon leaving the bathroom unless he bathed or used the toilet facilities. While it is not permitted to say a blessing or to pray there, it is permitted if necessary to wash one's hands for prayer and the meal. The blessing, however, should be said outside the bathroom.

3. *RULES OF DRESS AND CONDUCT*

(Hebrew words omitted in printing)

1. One should endeavor to be modest in all his ways, as it is written, "And to walk humbly with thy God" (Micah 6:8). Modesty is a great virtue which one should seek to cultivate and observe even in complete privacy, because habit becomes second nature.

2. One must not wear immodest clothing,[1] or clothes that

betoken pride and ostentation. Neither should they be torn or soiled, for though he may be inclined to disregard his own dignity, he must yet be respectful of others.

3. It is forbidden to follow heathen customs,[2] or to imitate them in their dress, or in their way of cutting the hair or letting it grow.

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1. *Wearing Sensually Provocative Clothing* Clothing designed to be sensually provocative should not be worn by men or women. Girls and women should not wear short dresses and mini-skirts which bare the thighs and thus tend to arouse sensual desire. Wearing such clothes, even when in compliance with the vagaries of prevailing fashion, is contrary to the Jewish tradition of modesty in dress, and transgresses the admonition against following immoral alien customs and practices.

2. *Taking an Oath With Head Uncovered.* While a religious person will refrain from taking an oath in court, as it entails mention of God's name, if it becomes necessary for him to do so he should keep his head covered while taking the oath. However, where this is not possible, he may take the oath with head uncovered, since this is the procedure that is normally followed. In these circumstances it is not subject to the prohibition against heathen customs.

4. Immediately upon rising a male should put on the *tallit katan,* for he must not go four cubits (approximately seven feet) without *tzitzit.* If his hands are washed he should say the benediction, (Hebrew words omitted in printing), "Blessed are thou, Lord our God, King of the universe, Who hath sanctified us with His commandments, and commanded us concerning the precept of *tzitzit.*" He should not go bareheaded[3] or utter any holy words

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3. Employment Where One Is Required to Go Bareheaded Wearing a head covering as a sign of humbleness and reverence before God is a revered tradition in Judaism and a token of Jewish identity. One is nevertheless permitted, especially where one's livelihood is involved, to accept employment in a position where he will be required to go bareheaded, inasmuch as covering the head is prescribed by custom but is not demanded by law. However, this applies only to the time and place of his employment, but not at other times.

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No. 84-1097

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

S. SIMCHA GOLDMAN,
Petitioner,

v.

CASPAR W. WEINBERGER,
SECRETARY OF DEFENSE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE PETITIONER

Of Counsel:
DAVID J. BUTLER
BROWNSTEIN, ZEIDMAN & SCHOMER
1401 New York Avenue,
Suite 900
Washington, D.C. 20005
(202) 879-5700

DENNIS RAPPS
NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS
450 Seventh Avenue,
Suite 2203
New York, N.Y. 10001
(212) 563-0100

NATHAN LEWIN
(Counsel of Record)
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorney for Petitioner

PACKARD PRESS / LEGAL DIVISION, WASHINGTON, D.C. 20036 (202) 783-0420

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QUESTION PRESENTED

Whether the Air Force may constitutionally prohibit an Orthodox Jewish psychologist from wearing a "yarmulke" — an unobtrusive skullcap which is part of his religious observance — while he is in uniform on duty at a military hospital.

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No. 84-1097

IN THE
Supreme Court of the United States

October Term, 1985

S. SIMCHA GOLDMAN,
Petitioner,

v.

CASPAR W. WEINBERGER,
SECRETARY OF DEFENSE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 734 F.2d 1531. The opinion of the district court (Pet. App. 28a-34a) is reported at 530 F. Supp. 12.

JURISDICTION

The decision of the court of appeals was issued on May 8, 1984. On August 10, 1984, the court of appeals denied a timely petition for rehearing and suggestion for

rehearing *en banc* (Pet. App. 21a-27a). On November 1, 1984, Chief Justice Burger extended the time for filing a petition for a writ of certiorari to and including December 10, 1984 (Pet. App. 37a). On December 3, 1984, Chief Justice Burger further extended the time within which to file a petition for a writ of certiorari to and including January 7, 1985 (Pet. App. 38a). The petition was filed on January 7, 1985, and certiorari was granted on June 17, 1985. The jurisdiction of this Court rests on 28 U.S.C. §1254.

STATEMENT

Petitioner is an Orthodox Jew who received rabbinical training and was ordained as a rabbi in 1970 (J.A. 154).[1] He served for two years as a chaplain in the United States Navy, and thereafter decided to study clinical psychology (J.A. 156-158). He enrolled in the Armed Forces Health Professions Scholarship Program and took courses in clinical psychology at Loyola University of Chicago. In September 1977, after graduating with a Ph.D. in psychology, petitioner entered on active duty with the Air Force, as a clinical psychologist, at March Air Force Base in California (J.A. 160).

From the time of his initial Air Force enrollment until early 1981 petitioner kept his head covered, as he had done all his adult life and as is traditional among Orthodox Jews.[2] This included the hours when he was on duty at the Air Force hospital (J.A. 161-167). When he was out of doors, petitioner wore the regulation Air Force cap.

1. "J.A." denotes the Joint Appendix filed in this Court.

2. The *bona fides* of petitioner's religious beliefs and the fact that it is part of Orthodox Jewish practice for males to wear a head covering at all times were admitted by the government in the district court. Specifically, the Air Force admitted that "[i]t is a well-established religious tradition and practice among adherents to Orthodox Judaism that males keep their heads covered at all times" (J.A. 146).

When indoors, where the wearing of the cap is prohibited by Air Force regulations, he wore a "yarmulke" — a dark-colored skull-cap measuring approximately 5½ inches in diameter (J.A. 206).

During this entire period of more than three-and-one-half years, petitioner received consistently outstanding performance ratings for his military service (J.A. 184, 214-225). No complaints concerning his yarmulke were received. Nor was there any other suggestion that his variance from standard Air Force dress had any harmful effect on his execution of his duties or on anyone else's performance (J.A. 163-167).

In April 1981 petitioner testified as a witness for the defense in a court-martial while wearing his yarmulke. Opposing counsel then made a complaint against him to the hospital commandant (J.A. 15). On May 8, 1981, petitioner was told by the commandant that by wearing a yarmulke while on duty he violated the Air Force Dress Code, AFR 35-10, and that he would no longer be permitted to commit this violation outside the hospital (J.A. 167-168). Less than two months later — after there had been discussion between an attorney representing petitioner and the Office of the Air Force General Counsel — the commandant revised his order to prohibit petitioner from wearing a yarmulke anywhere, including the hospital (J.A. 171-172, 207). On the following day, petitioner was given a formal letter of reprimand and threatened with additional sanctions, including a court-martial, if he did not cease wearing his yarmulke while in uniform (J.A. 208).

Petitioner promptly instituted this action for injunctive relief and damages. The district court entered a temporary restraining order and, after a hearing that was consolidated with a trial on the merits, issued an injunction sustaining petitioner's constitutional right to keep his head covered notwithstanding the Air Force regulation (Pet. App. 35a-36a). Quoting this Court, the district

court observed that military discipline "may render permissible within the military that which would be constitutionally impermissible outside it," but that "deference does not mean abdication" (Pet. App. 32a-33a). Having heard the testimony of expert witnesses and such explanation as the Air Force gave for its refusal to grant an exemption from its dress code for petitioner's religiously motivated wearing of a yarmulke, the district court concluded that no "reasoned and deliberate" analysis supported the Air Force's prohibition (Pet. App. 33a). The district court enjoined the defendants from applying AFR 35-10 to petitioner "insofar as it relates to his wearing a yarmulke for religious reasons," ordered the expungement from petitioner's military records of all negative references relating to his wearing of a yarmulke, and awarded damages for pay lost as a result of the commandant's illegal order (Pet. App. 35a-36a).[3]

The court of appeals reversed. It held that the proper constitutional inquiry was "whether legitimate military ends are sought to be achieved by means designed to accommodate the individual right to an appropriate degree" (Pet. App. 11a). Although the court found various of the Air Force's justifications for barring a yarmulke in a military hospital "unpersuasive" (Pet. App. 16a) or "weak" (Pet. App. 17a), and acknowledged that petitioner's responsive arguments had "some force" (*id.*), the court concluded that "the peculiar nature of the Air Force's interest in uniformity renders the strict enforcement of its regulation permissible" (Pet. App. 19a). The court held that although the dress regulations are

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3. Petitioner had applied for an extension of his active duty with the Air Force prior to the events of May 1981. Although the commandant initially recommended that his application be granted, he withdrew that recommendation once the issue over petitioner's yarmulke arose (J.A. 21). Petitioner's application was then denied. Another action has been filed for damages resulting from this denial. *Goldman v. Secretary of Defense*, D.D.C. No. 81-3197. That action is awaiting the final outcome of this case.

"necessarily arbitrary," they may be enforced "not for the sake of the regulations themselves, but for the sake of enforcement" (*id.*).

Three Circuit Judges dissented from the denial of a petition for rehearing *en banc*. Circuit Judge Starr said that notwithstanding the deference due the military in matters relating to military affairs, the panel's decision "abdicates the judiciary's limited but important function in the extraordinarily delicate environment of military personnel" (Pet. App. 23a). He characterized the Air Force's treatment of petitioner as "patently unconscionable," noting that neither expert testimony nor common sense justified the conclusion that other servicemen would resent a dress code exception for sincere religious beliefs (Pet. App. 25a-26a). Circuit Judges Ginsburg and Scalia also dissented on the ground that the First Amendment required accommodation to petitioner's religious observance (Pet. App. 27a).

INTRODUCTION AND SUMMARY OF ARGUMENT

According to many respected rabbinical authorities, Jewish law requires observant men to keep their heads covered at all times. The religious obligation may be satisfied by wearing a yarmulke — a skull-cap that is universally recognizable as a form of religious observance. This case concerns the constitutional power of government to forbid an individual from observing this religious duty while he serves as a psychologist at an Air Force hospital.

Wearing a yarmulke is the paradigmatic benign religious observance. The yarmulke's impact on society is singularly inoffensive, nonintrusive and nonburdensome.

(1) Because the religious obligation is totally fulfilled by the wearing of an article of apparel, it is a private religious observance that neither involves nor interferes

with any person other than the wearer.[4]

(2) Wearing a yarmulke creates no risk of any kind to the public health and welfare.

(3) Wearing a yarmulke imposes no economic or other burden on anyone else.

(4) No special procedure, expense or change in an employer's routine is required to accommodate an employee's religious observance in wearing a yarmulke.

(5) The wearing of a yarmulke is recognizable as a *religious* observance and will not be perceived as a mere personal preference.

(6) The wearing of a yarmulke is not a "valuable" or "widely prized" right that non-religionists would demand for personal secular reasons.

The Air Force has denied petitioner the right to wear his yarmulke not because it claims that the yarmulke endangers public health or welfare or jeopardizes anyone's safety or well-being. Respondent's only justification for its prohibition is that the yarmulke is not authorized by the Air Force's Dress and Personal Appearance Code. The Air Force contends that its authority over the dress of military personnel is so total that it may refuse to permit any apparel exceptions whatever even if a requested exception is based on constitutionally protected rights.

We emphasize that it is the Air Force, and not the petitioner, who is claiming an absolute right. We acknowledge the teaching of this Court's decisions regarding the Free Exercise Clause that was initially expressed in *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940) — *i.e.*, that while freedom to believe is "absolute,"

4. Copies of photographs of petitioner wearing the yarmulke, identified during his deposition, appear at J.A. 13. We apologize to the Court for the poor quality of the reproduction, but the original photographs — taken with a Polaroid camera — have inexplicably been lost from the official record. The copies do demonstrate, however, that the yarmulke is close-fitting and is barely noticeable on petitioner's head.

freedom to act pursuant to religious convictions "remains subject to regulation for the protection of society." There is simply no "protection of society" involved in the Air Force's prohibition of the yarmulke. Our claim that petitioner had a constitutional right to wear his yarmulke while in service with the Air Force is not based on a broad constitutional declaration of right but rather rests on a careful and particularized appraisal of the personal and nonintrusive nature of the religious observance at issue, the direct and immediate impact on petitioner's religious observance caused by the Air Force's prohibition of a yarmulke, and the total lack of any "overriding governmental interest" that would justify banning a yarmulke.

This case proceeded to a full trial, during which the Air Force had every opportunity to demonstrate that the wearing of a yarmulke threatened military discipline and morale. In fact, the history of petitioner's own tenure in the Air Force, the record of another Orthodox Jew who wore a yarmulke for two years while serving as a pediatrician in the Air Force, and the absence of any specific instances of disruption proved that there is no possibility of harm in permitting a yarmulke to be worn. In addition, the Air Force did not show in the district court that if a religious exemption were available it would be claimed by enough servicemen to have any impact on the military. Nor did the Air Force consider limiting an exemption to servicemen who based their requests only on religious grounds. Instead, it erroneously assumed that if exemptions were granted on religious grounds, they would also have to be granted for non-religious personal reasons. Finally, the district court found, on ample proof, that morale in the Air Force would be *improved* if exemptions from the Dress Code were permitted.

The Solicitor General has recently proposed a novel constitutional doctrine to govern Free Exercise claims, and his doctrine departs radically from the analysis made by this Court in virtually every freedom-of-religion case

that has been heretofore decided. Rather than inquiring whether a compelling state interest outweighs an exemption for religious observers in cases involving governmental interference with religiously motivated conduct, the Solicitor General now urges this Court to look only at the "programmatic interests" behind the governmental regulation. He maintains that individualized exceptions from a facially neutral regulation are not mandated even for religious observance, no matter how slight the governmental burden or how negligible the impact on the governmental objective. This theory conflicts with what this Court has said previously and with the premises underlying the Free Exercise Clause.

We discuss separately the unique needs of the military which, it has been asserted, warrant "enforcement of regulations, not for the sake of the regulations themselves, but for the sake of enforcement" (Pet. App. 19a). We note that this Court has never authorized the total abdication of constitutional judgments to military authorities. The justification articulated by the Air Force — *i.e.*, its desire for absolute uniformity in dress and appearance — is not immune from judicial scrutiny when a constitutional liberty is at stake.

The Air Force's asserted grounds for barring yarmulkes are patently unsound. The possibility that other military personnel will resent minor exemptions from a standard uniform for observances of religious servicemen is analogous to the now discredited World War II justification for racial segregation in the military. And the fear that if yarmulkes are permitted, "the floodgates will open" and countless military personnel will demand other forms of religious exemptions from the Dress Code is neither supported by the record nor based on any real-life human experience. Indeed the symbolic significance of our Nation's military services and the educational role of the military in teaching the young defenders of our country the principles of liberty require acceptance of petitioner's religious observance. As Judge Starr noted in

dissent, it is unacceptable to argue "that the needs of the military warrant vitiating the very liberties which the armed services have valiantly defended in the two centuries of the Nation's history" (Pet. App. 24a).

ARGUMENT

I.

WEARING A YARMULKE IS A RELIGIOUS OBSERVANCE THAT INTERFERES WITH NO ONE ELSE, DOES NOT HARM THE PUBLIC HEALTH OR WELFARE, AND IMPOSES NO BURDEN OF ACCOMMODATION

Judge Starr accurately perceived that wearing a yarmulke "partakes of the religious significance of prayer and is equally unobtrusive" (Pet. App. 24a). In fact, wearing a yarmulke is the paradigmatic benign religious observance. It is a personal act, affecting only one's own body. The wearer of a yarmulke interferes with no other person and casts no burden, economic or otherwise, on anyone else. He presents no risk, by reason of his yarmulke, to the public health and welfare. Nor does he demand that anyone else change his way of doing business or undergo special procedures or expense to accommodate the religious observance. All that the wearer of the yarmulke asks is tolerance and acquiescence in his slightly idiosyncratic apparel. The sole objection that can be made to the yarmulke is that it can be seen. The fact that it is visible apparel, in and of itself, is the reason why the Air Force wants to forbid it.[5]

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5. The Air Force's objection concerns a yarmulke that stays on the wearer's head, not the risks if the yarmulke falls off during vigorous exercise. Compare *Menora v. Illinois High School Association*, 683 F.2d 1030 (7th Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983). Nor does this case concern judicial proceedings, where the yarmulke, by reason of its religious identification of the wearer,

These unique aspects of this religious practice distinguish this case from previous decisions of this Court rejecting claims under the Free Exercise Clause. The classic decision of this Court denying a Free Exercise claim was *Reynolds v. United States*, 98 U.S. 145 (1879), in which a law prohibiting polygamy was upheld even though it inhibited the religious practices of a faith that encouraged polygamy. In *Reynolds*, as well as in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and in *Prince v. Massachusetts*, 321 U.S. 158 (1944), this Court upheld the regulation of religiously motivated conduct because the regulated conduct jeopardized the public welfare. Since polygamy (*Reynolds*) and child labor (*Prince*) were contrary to public policy, the government's authority to prohibit such conduct extended even to devout religionists who engaged in it for sacred motives. And since the public welfare warrants stringent measures to prevent the spread of disease, the *Jacobson* decision held that vaccination may be made mandatory notwithstanding conscientious objections.[6] For similar reasons the Court also recently refused to allow religious observance to override the compelling governmental interest in eradicating racial discrimination in education. *Bob Jones University v. United States*, 461 U.S. 574, 603-604 (1983).

There have, in addition, been cases where the burden of accommodation was deemed too great to warrant a religious exemption. The Court upheld a state Sunday law that inhibited Sabbath-observance by making it

NOTES (*Continued*)

might create unfair bias or prejudice. Compare *La Rocca v. Lane*, 37 N.Y.2d 575, 338 N.E. 2d 606 (1975), *cert. denied*, 424 U.S. 968 (1976).

6. Lower courts have applied these principles to cases involving other religiously motivated acts that violate public policy, such as snake-handling or the use of narcotics. *See, e.g., State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976); *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983).

"more expensive" because it could not be accommodated with a religious exemption. *Braunfeld v. Brown*, 366 U.S. 599, 605, 608-609 (1961). And just last Term the Court even invalidated, under the Establishment Clause, a law protecting Sabbath-observing employees because it gave them "absolute" rights at the expense of "other employees who do not observe a Sabbath." *Estate of Thornton v. Caldor, Inc.*, 105 S.Ct. 2914 (1985).

Unlike the religious observances involved in *Bob Jones* or in *Thornton*, wearing a yarmulke has absolutely no impact on the rights or conduct of others. It is a personal mark of religious identity and an individualized acknowledgment of a Divine Creator. It is, in this regard, no different from symbolic devotion or prayer. Hence it is at the very heart of the protection afforded by the Free Exercise Clause of the First Amendment.

Yarmulkes are generally understood to be a form of religious observance. They are commonly seen and accepted in today's society wherever Orthodox Jews are found. University campuses — particularly on the East Coast — have substantial numbers of young men who wear yarmulkes. On the streets of New York City, Los Angeles, Chicago, or Miami, yarmulkes are commonplace. They are increasingly visible in centers of commerce, including retail businesses, brokerage houses, and stock exchanges. Attorneys wearing yarmulkes can be found in the state and federal courthouses of New York, and attorneys wearing yarmulkes have been permitted to sit in the Bar Section of this Court and attend oral arguments.

Wearing a yarmulke is a form of silent devotion. It is the functional equivalent of prayer, because it manifests one's belief in a Supreme Being. When he first described the First Amendment's dual provision as "building a wall of separation between church and State," Thomas Jefferson also declared that man "owes account to none other for his faith or his worship, [and] that the legislative powers of government reach actions only, and not

opinions." 8 Works of Thomas Jefferson 113, quoted in *Braunfeld v. Brown*, 366 U.S. 599, 604 (1961). Wearing a yarmulke is as private and nonintrusive as are belief and prayer. Hence there is rarely any justification for government interference with this observance, and it is entitled to the same protection against legislative encroachment as is afforded to prayer or other forms of worship.

II.

THE RECORD IN THIS CASE REFUTES RESPONDENTS' ASSERTIONS THAT PROHIBITION OF A YARMULKE IS NECESSARY TO PRESERVE MILITARY DISCIPLINE OR MORALE

The court below deferred to the Air Force's contention "that precise adherence to its uniform requirements is necessary to maintain teamwork, motivation, discipline, esprit de corps and image, and that making exceptions for any reason would undermine these goals" (Pet. App. 15a). The Air Force's assertion was, however, nothing more than a sweeping *ipse dixit*. It was based on no actual experience or scientific study, and it was, in fact, contradicted by substantial evidence in the record.

A similar broad assertion of an overriding governmental interest in the education of children was invoked by the state in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). This Court's response to the assertion made in *Yoder* is fully appropriate here (406 U.S. at 221):

> Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed Amish exception.

If that approach is taken in this case, and the Air Force's interests are examined in light of the facts established by the record — as was done in *Yoder* (see 406 U.S. at 222-229) — it is clear that the prohibition of petitioner's act of religious devotion was not justified by any legitimate governmental interest.

A. The Record Established That Wearing a Yarmulke in the Military Results in No Diminution of Military Teamwork, Discipline, or Effectiveness.

A full trial was held on the allegations of petitioner's complaint, and the Air Force had ample opportunity to prove, if it could, that if a member of the armed forces wears a yarmulke the effectiveness of the military will be diminished. The record actually proved the contrary.

(1) *Goldman's Own Experience.* — The petitioner testified about his own experiences during the 44 months that he wore a yarmulke undisturbed while serving as a psychologist at March Air Force Base (J.A. 158, 161-167, 185-186). During that time, no one objected to his wearing a yarmulke and, other than a few inquiries by interested co-workers or patients (J.A. 166-167), it caused little comment. During his entire period of service, his written performance ratings were all "well above standard" or "above standard" (J.A. 184, 214-225). Indeed, his ratings on "Professional Qualities (Attitude, dress, cooperation, bearing)" were "well above standard" in all five reports covering his period of service. One report even stated, "He maintains appropriate military dress and bearing . . . ." (J.A. 217).

If petitioner's yarmulke had, during this extended period, caused the slightest disruption of military discipline or morale, one would surely have expected some mention of the fact in at least one of the five reports. Instead, the reports can only be described as glowing. The last of the ratings, dated October 20, 1980, described him as "an essential member of the professional staff,"

lauded his "expertise, enthusiasm and productivity," and praised his "initiative and leadership . . . and the high professional and military standards he has achieved" (J.A. 224). The Lieutenant Colonel who was his supervisor concluded, "Promotion is strongly supported without reservation" (J.A. 224). The supervisor's superior called petitioner's work "vital" and "essential," and praised his "valuable suggestions" and his supervision of "technicians." He also concluded, "Promotion to Major is strongly recommended" (J.A. 224).

The record amply supported the district court's Finding of Fact 14 (Pet. App. 32a):

> During his service at March Air Force Base, Goldman's wearing of a yarmulke while in military uniform did not adversely affect the performance of his assigned duties nor the operations at the Base Regional Hospital and did not result in complaints from other personnel. Goldman's performance evaluations were consistently at the higher levels. His application for the renewal of his Air Force contract was endorsed with a commendation for his work in the Mental Health Clinic.

(2) *The Experience of Others.* — One of petitioner's witnesses was an Orthodox Jewish pediatrician who had served at Pease Air Force Base from 1974 to 1976 (J.A. 105). The hospital administrator initially advised him that he could not wear a yarmulke, but a waiver request was then submitted and granted (J.A. 106-116). The pediatrician testified that during his two years in the Air Force he wore his yarmulke everywhere, including the hospital and the nursing center. He received occasional questions from children, who had never seen a yarmulke before (J.A. 117). His testimony concluded with the following questions (J.A. 117-118):

> Q. Did any of the enlisted men on base question you about wearing the yarmulke?

A. No.

Q. Did you receive any indication that the yarmulke in any way interfered with your ability to perform your duties as a pediatrician?

A. No.

Q. Once you were permitted to wear your yarmulke for that period of time, did you have any indication that any kind of discipline problems developed at Pease Air Force Base as a result of your wearing the yarmulke?

A. No.

(3) *The Absence of Disruption.* — Another highly probative point is the Air Force's failure to cite a single instance in which the wearing of a yarmulke, or any other religiously motivated exception to the Dress Code, resulted in a disruption of morale. The Air Force acknowledged, in response to petitioner's interrogatories, that no study had ever been done or empirical data gathered to establish any relationship between strict enforcement of a dress code and military discipline or effectiveness (J.A. 27). In addition, the Air Force's expert witness, Major General William R. Usher, conceded that he knew of no incident involving any disruption of morale in the Army after Sikhs were permitted to wear beards (J.A. 55), or in the Air Force after district courts ordered the Air Force to permit Jewish chaplains to wear beards (J.A. 65-67). The chaplain who testified on behalf of the Air Force was asked whether it interfered with military discipline if enlisted men are told to respect the religious attire of their fellow servicemen. He replied (J.A. 99):

I do not have information to answer that one honestly. I am not sure.

> I have not — I have not run into an occasion personally where there was an interference of any kind.

There is, in fact, a gaping hole in the record. There is not a scintilla of proof that religious exemptions from the Dress Code impair military discipline, effectiveness or morale. The Air Force seeks to capitalize on that void, asserting that courts are bound by the military service's bare declaration that religious exemptions will jeopardize military effectiveness. We submit that the burden of proof lies with the Air Force. If it wishes to limit the exercise of a seemingly innocuous religious observance, it must prove — or at least offer some evidence — that the practice gives rise to a threatened danger.

This Court plainly cast the burden on the government agency seeking to restrict religious liberty in its landmark decision in *Sherbert v. Verner*, 374 U.S. 398 (1963). In that case, the Court said (374 U.S. at 406):

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Thomas v. Collins*, 323 U.S. 516, 530.

There is, on this record, no proof of any "grave abuse endangering paramount interests." There is, instead, convincing proof that wearing a yarmulke has never interfered and will not interfere at all with the military's mission.

B. The Air Force Failed to Demonstrate That a Religious Exemption to the Dress Code Will Be Claimed By Many Military Personnel.

In *United States v. Lee*, 455 U.S. 252 (1982), this Court rejected a Free Exercise claim because it concluded that "it would be difficult to accommodate the

comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs." 455 U.S. at 259-260. It was clear to the Court, simply as a matter of human experience, that if individuals could be exempted from paying taxes by invoking religious beliefs, the country's entire tax system would collapse. The same cannot, however, be said of the claim made here. There is nothing intrinsically desirable about wearing a skullcap or any other religiously mandated apparel. Hence there is no reason to presume that if an exemption from the Dress Code is permitted for religious apparel, it would be invoked by many servicemen.

In fact, the record made in the district court proved the contrary. Major General Usher — the Director of Personnel Plans at Air Force Headquarters in Washington — was asked whether he had ever been personally involved in any case other than petitioner's in which a serviceman sought an exemption from the Dress Code for religious reasons. He replied in the negative (J.A. 53). He was then asked to describe "the most extreme case you have heard of," and he cited a request by practicing Sikhs to wear beards and turbans. The Air Force's Director of Personnel Plans was then asked (J.A. 54):

> Q. Have you ever heard of any members of the Sikh religion, to your knowledge, in the Air Force?
>
> A. Not to my knowledge.

When he was asked to estimate "the maximum number of people in the Air Force . . . who have some religious belief that would affect the clothing that they wear in violation of Air Force dress code," General Usher replied that it was "an unknown unknown" (J.A. 59). Chaplain Reeves, who had drawn up a chart of minority religious denominations in the United States, including those who have special dress requirements, acknowledged that he did not know whether there were, in the Air Force or in any military branch, any members of the

sects that had special dress requirements (J.A. 92-93, 95-96). With regard to the Sikhs, Chaplain Reeves testified that he knew of no dress exception request from any Sikh member of the Air Force (J.A. 95). His testimony on this point was encapsulated in the following question and answer (J.A. 96):

> Q. In fact, going through the rest of your study, leaving out for the time being the Jewish groups and the one member of the Sikhs whom you have described, do you know of anyone in the Air Force who is a member of any or adherent to any religious faith that requires some exception or variation from the Air Force dress code, according to your statement?
>
> A. Not that I can think of, no, sir.

Additional proof that the Air Force need not fear a deluge of exemption requests comes from the absence of requests in its files. In Interrogatory 9(a), the Air Force was asked to name the individuals who had requested exemptions from the Dress Code, and no such requests based on religion were found and produced (J.A. 23-24).

The inescapable inference from the evidentiary record is that religious exemptions from the Air Force's Dress Code are only a theoretical problem. If the Air Force were to permit those who have sincere conscientious scruples to wear an article of apparel that deviates from the Dress Code, these instances would be few and far between. And they would have no impact whatever on the discipline, effectiveness and morale of the Air Force.

C. The Record Established That the Air Force Has Not Considered Limiting Exceptions to the Dress Code to Servicemen Who Claim a Religious Basis for Their Distinctive Apparel.

General Usher's contention during his testimony was that the Air Force had to prohibit petitioner's

yarmulke because "it is a matter of where you draw the line" (J.A. 41). He explained that, in his view, any deviation involves "personal standards and tastes" (*id.*), and it would be impossible to distinguish between religious standards and those that are purely personal.

The Air Force's refusal to treat religious claims differently from purely secular ones was made more explicit during General Usher's cross-examination, when he said (J.A. 49):

> . . . I say that our position is that we do not make any exception on religious grounds. Of course, we do not distinguish between religious and other grounds.
>
> Q. You do not distinguish between religious and non-religious grounds?
>
> A. That is correct.

Subsequently, General Usher testified (J.A. 55):

> Q. Well, you would agree, would you not, that personal tastes not based on religion can be distinguished from religious obligations or religious compulsions of some kind that someone feels?
>
> A. No, I do not.
>
> Q. You do not believe so?
>
> A. No.

The district court found as a fact that "the Air Force does not distinguish between personnel deviating from uniform dress for religious reasons and those deviating from uniform dress for other reasons such as personal taste or preference" (Pet. App. 31a). The refusal to make that distinction plainly infringes upon a constitutionally protected liberty. A government agency may not refuse to recognize a religiously based exception on the ground that it is indistinguishable from an exception based entirely on personal taste or preference. Indeed, if such

equivalent treatment of religious and non-religious claims were permissible, this Court's decisions upholding Free Exercise claims could not have been decided as they were. Could the State of Wisconsin have denied the Amish claim for religious exemption in the *Yoder* case on the ground that it refused to draw any line between religious and non-religious requests to be exempt from high school attendance? This Court would not have decided, as it did in *Wisconsin v. Yoder*, 406 U.S. 205, 235-236 (1972), that the Amish had made a "convincing showing, one that probably few other religious groups or sects could make," if a government agency could unilaterally refuse to distinguish between religious and non-religious claims.

By the same token, *Sherbert v. Verner*, 374 U.S. 398 (1963); *In re Jenison*, 375 U.S. 14 (1963); and *Thomas v. Review Board*, 450 U.S. 707 (1981), could not have been decided as they were if a state could simply refuse to acknowledge a difference between religious and secular claims. Had the State of South Carolina been heard to argue in *Sherbert*, as the Air Force does here, that it could not grant religious exemptions without granting similar non-religious requests, the effect on the state's unemployment compensation system would have been disastrous. The same would have been true of compulsory jury service involved in the *Jenison* case.

The correct constitutional rule is that a government agency confronted with a request for a *religious* exemption must consider whether the granting of *religious* exemptions would defeat or significantly interfere with the regulatory goal. It is constitutionally impermissible to deny a requested religious exemption on the ground that too heavy a burden would be placed on the regulatory scheme if non-religious exemptions were also permitted.

D. The Record Established That Religious Exemptions Are Desirable.

Under *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Board*, 450 U.S. 707 (1981), it was the Air Force's burden to demonstrate that it had "interests of the highest order" to overbalance petitioner's religious observance. For reasons previously stated, it is clear that the record does not sustain such a showing by the Air Force. We submit, in addition, that the record goes beyond the Air Force's failure to sustain its burden. The evidence proved the contrary, and the district court — whose duty it was to weigh any conflicting opinions — credited testimony that said that granting religious exemptions would affirmatively benefit the military.

The district court's Finding of Fact 12 reads as follows (Pet. App. 31a):

> Exceptions for legitimate reasons from the requirements of AFR 35-10 may enhance the effectiveness of the Air Force by dissipating hostility over minor matters and thus contribute to a perception of the Air Force as a less rigid, more humane institution. Occasional exceptions to the requirements of AFR 35-10 for specific legitimate purposes will not adversely affect the ability of the Air Force to carry out its mission.

The district court's conclusion was based on *military* testimony given by the Air Force's own Chief Clinical Psychologist. Petitioner's witness was Dr. Samuel Levinson, who had served as Chief Clinical Psychologist to the Air Force between 1971 and 1977 (J.A. 119). He acknowledged that it was beneficial for the Air Force to require the wearing of a uniform but testified, on the basis of 26 years in the Air Force, that there are many informal exceptions to the Dress Code (J.A. 125-127), and that such exemptions actually improve morale in the military service (J.A. 127-128). Dr. Levinson testified (J.A. 129-131):

Q. All right. Would the fact that a particular variation from the dress code based on religion affect other personnel's view of that variation in any way?

A. No, I think what they would do is treat it with respect and get a sense of the system is somewhat flexible and that the system does respect — does respect religion.

* * *

Q. And with regard to religious variations, is it your view as a psychologist that the same would be true if exemptions were permitted for religious variations . . .

A. Yes.

Q. . . . from the dress code?

A. Yes.

Q. Would that in any way have any educational impact on Air Force personnel as well as with regard to our pluralistic society?

A. Yes. I think it would teach people that there is room for differences, differences that are not flaunted in a negative or power-struggle kind of way, differences that have little or nothing to do with the mission at hand, you know.

Dr. Levinson also testified that in his expert opinion, the wearing of a yarmulke by an Air Force psychologist presented no serious problem for discipline, teamwork, motivation, esprit de corps, or image to the military (J.A. 133-136). His testimony, together with the acknowledgement of the Air Force's witnesses that it is desirable to teach servicemen that diverse religious communities exist within the country (J.A. 58, 97-98), establish the affirmative benefits of granting religious exemptions from the Dress Code.

III.

THE BURDEN IMPOSED BY GOVERNMENTAL ACCOMMODATION TO A PARTICULAR RELIGIOUS OBSERVANCE, NOT THE GOVERNMENT'S "PROGRAMMATIC INTEREST" IN A GENERALLY APPLICABLE REGULATION, IS THE RELEVANT CONSTITUTIONAL STANDARD

In his *amicus* brief last Term in *Jensen v. Quaring*, No. 83-1944, affirmed by an equally divided court, 105 S.Ct. 3492 (1985), and again in his brief in the companion to this case, *Heckler v. Roy*, No. 84-780, the Solicitor General makes a novel and pernicious constitutional argument that would eradicate much of the constitutional protection that the Free Exercise Clause has heretofore afforded to constitutional minorities. He contends that the Constitution never confers upon a religious observer an individualized exemption from a general, facially neutral governmental regulation. Under the Solicitor General's argument, the Free Exercise Clause requires only that government implement its "programmatic interests" by the least burdensome alternative "applicable to the populace as a whole" (Brief for the Appellants, No. 84-780, p. 29). The ease with which a particular religious observance may be excepted from a general regulation or may be otherwise accommodated is, under this view, irrelevant. The sole focus of a reviewing court must be on the government's "programmatic interests" and on whether they have been implemented by the "least restrictive means" vis-a-vis *everyone* who is affected. The consequence of this argument is that even if an exemption for a religious observance would not have the slightest effect on the objectives of a regulatory program, the observance could be prohibited under a facially neutral regulation.

The Solicitor General's argument is contrary to the premises that underlie all of this Court's decisions under the Free Exercise Clause. In a number of cases the Court

has, to be sure, rejected Free Exercise claims because, as articulated in the parameter-setting language of *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940), a restriction upon the religious observance was necessary "for the protection of society." But in no reported case has this Court approved the approach now urged by the Solicitor General.

A. This Court's Decisions Sustaining Constitutional Claims Under the Free Exercise Clause Rest on an Appraisal of the Effect of Individualized Exemptions.

In *Sherbert v. Verner*, 374 U.S. 398 (1963), this Court upheld the Free Exercise claim of a Seventh-day Adventist who was denied unemployment compensation because she refused to take jobs that would have required her to work on her Sabbath. In considering whether the state had a "compelling state interest" that justified the denial of the religionist's request for compensation, this Court did *not* look to the "programmatic interests" of the government; it rather considered whether the denial of an exemption for religious observers was justified by a "compelling state interest."

The Court's relevant discussion, appearing at 374 U.S. 406-409, considers only the question whether an insurmountable "abuse or danger" would be presented by exempting workers who assert conscientious objection to Saturday work. The Court found that the "possibility" of "fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work" was not established by the record, and it was "highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties." 374 U.S. at 407. Indeed, in considering the possibility of "alternative forms of regulation," the Court explicitly cited the rulings of state courts and many local administrative agencies that had exempted individuals

who asserted "conscientious objections to work on the Sabbath." 374 U.S. at 407-408, n. 7.[7]

Had this Court in *Sherbert* followed the Solicitor General's proposed analysis, the effect of an exemption for religious observers would have been irrelevant. The only question would have been the weight of the "programmatic interests" of denying unemployment compensation to those who voluntarily rejected job offers. Plainly, a state has significant interests in denying benefits in such cases, and the minimal effect of exempting conscientious objectors would, under the Solicitor General's theory, have been entirely beside the point.

This Court followed the same approach — weighing the likely consequences of exempting religious observers — in *Thomas v. Review Board,* 450 U.S. 707 (1981). After concluding that denial of unemployment compensation was an infringement on the free exercise of religion, the Court held that such an "inroad on religious liberty" could only be justified if it were "the least restrictive means of achieving some compelling state interest." 450 U.S. at 718. The Court did *not* then analyze the "compelling state interest" in light of any across-the-board "programmatic interests." Instead it did precisely what the Solicitor General asserts should not be done in Free Exercise cases — it examined whether the governmental interest would be seriously impaired by granting the requested religious exemption, considering explicitly how numerous the requested exemptions would be (450 U.S. at 719; emphasis added):

> There is no evidence in the record to indicate that *the number of people* who find themselves in the

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7. The Court even distinguished *Braunfeld v. Brown,* 366 U.S. 599 (1961), on the ground that "[r]equiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable." 374 U.S. at 408-409.

> predicament of choosing between benefits and religious beliefs is large enough to create "widespread unemployment," or even to seriously affect unemployment — and no such claim was advanced by the Review Board. Similarly, although detailed inquiry by employers into applicants' religious beliefs is undesirable, there is no evidence in the record to indicate that such inquiries will occur in Indiana, or that they have occurred in any of the states that extend benefits to people in the petitioner's position. Nor is there any reason to believe that *the number of people* terminating employment for religious reasons will be so great as to motivate employers to make such inquiries.

The Solicitor General asserts that *Sherbert* and *Thomas* were decided as they were simply because there was in each case no demonstration of a compelling governmental interest (Brief for the Appellants, No. 84-780, p. 38), without specifying — as the opinions themselves do — the nature of the private interest that the compelling governmental interest would have had to outweigh. In fact, the Court's opinions in both cases reveal that the Court determined there was no compelling governmental interest in *denying a religious exemption from the general rule*, thereby proving that it is the impact of an exemption, not the importance of the government's "programmatic interests," that must be the focus of a reviewing court's attention.[8]

Moreover, the Court's reasoning in *Sherbert v. Verner* is demonstrated by its almost contemporaneous summary ruling in In *re Jenison*, 375 U.S. 14 (1963).

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8. The Solicitor General creates a *post hoc* rationalization for *Sherbert* and *Thomas* when he asserts that it was relevant in those cases that the particular unemployment compensation laws used the words "good cause." Brief for the Appellants, No. 84-780, p. 38 n.16. Nothing in either opinion suggests that those words were critical or even relevant.

Sherbert was decided on June 17, 1963. On the first decision day of the Term beginning October 1963, the Court summarily reversed a contempt-of-court conviction of a woman who had refused to serve on a petit jury because such service violated her religious convictions. *In re Jenison Contempt Proceedings*, 265 Minn. 96, 120 N.W.2d 515 (1963). This Court's *per curiam* order directed "further consideration in light of *Sherbert v. Verner*, 374 U.S. 398." See 375 U.S. 14. The various rationalizations now provided by the Solicitor General for the decisions in *Sherbert* and *Thomas* plainly did not apply to the question whether an individual prospective juror was entitled to be excused from service, under the Free Exercise Clause, if her potential service violated her conscientious conviction.

The Minnesota Supreme Court understood *Jenison* to require an examination of whether excusing religiously observant jurors would disable or seriously harm the jury selection system. On remand, the Minnesota court said (*In re Mrs. Owen Jenison*, 267 Minn. 136, 125 N.W.2d 588 (1963); emphasis added):

> Upon reconsideration we have come to the conclusion there has been an inadequate showing that the state's interest in obtaining competent jurors requires us to override relator's right to the free exercise of her religion. Consequently we hold that *until and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system, any persons whose religious convictions prohibit compulsory jury duty shall henceforth be exempt*.[9]

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9. Since the result in *Jenison* was a complete exemption from jury service for the conscientious objector, it disproves the Solicitor General's assertion that *Sherbert* and *Thomas* were merely cases that prevented "discriminat[ion] against the exercise of religious beliefs" rather than granting "favored treatment for members of the

More compelling refutation of the Solicitor General's theory than *Sherbert*, *Thomas* and *Jenison*, however, is provided by the Court's opinion in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The Solicitor General apparently recognizes that he cannot explain the result in *Yoder* under his novel constitutional theory, and he dismisses it briefly as "sui generis," asserting that it involved a clash between the interests of society and the interests of parents in raising their children. Brief for the Appellants, No. 84-780, p. 41.

Notwithstanding the quotations from the *Yoder* opinion that the Solicitor General plucks out of context, *Yoder* did not turn on the doctrine of "parental primacy." Only in evaluating the state's claim that its opinion of what was best for children could, under the doctrine of *parens patriae*, replace the considered judgments of parents did this Court invoke the "traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions." 406 U.S. at 231. Earlier in its opinion the Court considered the basic Free Exercise claim made by the Amish, who asserted that they were constitutionally entitled to exemption from the law's compulsory education requirement beyond the eighth grade. The Court's statement of the issue, as well as its conclusion, demonstrate that the critical constitutional question was whether an individualized exemption was mandatory, not whether the state's "programmatic interests" were compelling (406 U.S. at 221, 235-236; emphasis added):

> Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the

NOTES *(Continued)*

religious sect." Brief for the Appellants, No. 84-780, p. 40. In this regard, *Jenison* is like *Yoder*, which recognized that, in appropriate circumstances, the Constitution compels the granting of a religiously based exemption.

> interests that the State seeks to promote by its requirement for compulsory education to age 16, *and the impediment to those objectives that would flow from recognizing the claimed Amish exception.*
>
> * * *
>
> In light of this convincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, *it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.*

By the same token, in this case and others in which a religious observer seeks an exemption from a law or regulation of general applicability, it is incumbent on the government agency to demonstrate how its interest "would be adversely affected by granting an exemption" based upon religious or conscientious scruples.[10]

B. This Court's Decisions Rejecting Constitutional Claims Under the Free Exercise Clause Do Not Support the Solicitor General's Novel Constitutional Theory.

We turn now to the other side of the constitutional coin — the decisions of this Court that have denied Free Exercise claims. If the Solicitor General's constitutional theory were correct, those decisions should merely have weighed the "programmatic interests" behind facially neutral legislation or regulation without considering whether exemptions for conscientious objectors would

10. Professor Tribe has cautioned, "[I]t is crucial to avoid the error of equating the state's interest in denying a religious exemption with the state's usually much greater interest in maintaining the underlying rule or program for unexceptional cases." L. Tribe, American Constitutional Law 855 (1978).

have substantially undermined or inhibited the governmental objectives. In fact, the decisions did not follow this course.

Braunfeld v. Brown, 366 U.S. 599 (1961), is illustrative. The question in *Braunfeld* was whether Sabbath-observing shopkeepers were constitutionally entitled to be exempt from Sunday-closing laws. This Court held first that religiously based conduct is subject to legislative power if the conduct is "found to be in violation of important social duties or subversive of good order . . . ." 366 U.S. at 603. The Court then observed that the effect of the Sunday Laws on the Sabbatarian shopkeepers was not to prohibit their religious practices but only to make those practices "more expensive." 366 U.S. at 605-606. This was held to be "an indirect burden on the exercise of religion." 366 U.S. at 606.

The Court then considered the purposes behind the Sunday Laws and concluded that these objectives — which the Solicitor General would presumably characterize today as "programmatic governmental interests" — were significant and permissible. 366 U.S. at 607-608. Under the Solicitor General's novel constitutional theory, the opinion should have ended at that point.

The Court went on, however, to discuss the core of the shopkeepers' Free Exercise claim (366 U.S. at 608):

> They contend that the State should cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday.

The Court did *not* say in *Braunfeld*, as the Solicitor General now argues, that "it is not relevant that granting exemptions in rare cases might work only a minute or incremental interference with the governmental interest." Brief for the Appellants, No. 84-780, p. 34. Instead, the Court closely analyzed the consequences of permitting exceptions, examining whether they would,

in fact, be only minute or incremental interferences. The Court then and held (366 U.S. at 608)

> reason and experience teach that to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity.

The Court enumerated the problems that would arise if religious exemptions were permitted: Enforcement would be more difficult because two or more days would have to be policed, Sabbatarians might obtain economic advantages over their competitors because of their exemptions, and this might be an inducement for spurious claims of religious conviction that could require "a state-conducted inquiry into the sincerity of the individual's religious beliefs." 366 U.S. at 608-609. Finally, the Court noted, exemptions for Sabbatarians might result in religiously discriminatory hiring. 366 U.S. at 609.

It is clear that the Court in *Braunfeld* believed that the constitutional issue was whether a religiously based exemption was mandatory. It rejected the constitutional claim because, in its view, such an exemption would have overcome the fundamental legislative objective — to provide a general day of rest for the community. Had the exemption not had this effect — *i.e.*, had its impact on the regulation been "minute or incremental" — it is obvious that the Court would have upheld the constitutional right.

A similar approach was followed in cases such as *Reynolds v. United States*, 98 U.S. 145 (1879), and *Prince v. Massachusetts*, 321 U.S. 158 (1944). As the Court observed in *Braunfeld*, those cases involved "religious practices [that] themselves conflicted with the public interest." 366 U.S. at 605. Obviously, granting an exemption for an act that violates "important social duties or [is] subversive of good order" (366 U.S. at 603) is different from recognizing a religious exemption for an

act that is inherently innocuous and inoffensive but conflicts with some neutral regulation or standard of conduct imposed by the state for an extrinsic governmental purpose.

The Solicitor General also invokes two relatively recent cases as support for his theory. *United States v. Lee*, 455 U.S. 252 (1982), and *Bob Jones University v. United States*, 461 U.S. 574 (1983). Brief for the Appellants, No. 84-780, pp. 27-32. Neither decision, however, proves his point, and both tend to contradict it.

In *United States v. Lee*, 455 U.S. 252, 259-260 (1982), a claim that there should be a religious exemption from the duty to pay Social Security taxes was denied, but not because of the compelling "programmatic interests" in collecting such taxes. Rather, the Court considered the consequences that would flow if individualized religious exemptions were permitted. The Court held that rather than being limited to a manageable handful of conscientious objectors, a religiously based exemption would overwhelm the entire system of tax collection (455 U.S. at 260; citations omitted):

> The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

The Court also determined in the *Bob Jones* case that the compelling governmental interest "in eradicating racial discrimination in education" (461 U.S. at 604) precluded an exemption for conduct that would have conflicted squarely with that interest. *Bob Jones*, like *Reynolds* and *Prince*, involved religiously motivated conduct that collided head-on with a paramount governmental objective. As this Court noted (461 U.S. at 604; citations omitted):

The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, and no "less restrictive means" are available to achieve the governmental interest.

Bob Jones is distinguishable, therefore, from cases like this one, where an exemption for conscientious believers would not legalize conduct that is condemned by the legislature or by government regulation. In this case, the relevant constitutional question is whether an exemption based on religious practice would frustrate the realization of an overriding governmental interest.

C. The Policies of the Free Exercise Clause Require a Court to Appraise the Effect of Individualized Exemptions.

Finally, we turn to the fundamental policies of the Free Exercise Clause, which are inconsistent with the constitutional doctrine that the Solicitor General now expounds. The Solicitor General views it as "absurd" and as "defy[ing] common sense" to require government to accommodate "individuals holding the most unique and idiosyncratic religious beliefs" while possibly denying such accommodation to "religious beliefs so widely held that the administrative burden and programmatic impact would be deemed too great." Brief for the Appellants, No. 84-780, p. 35. This assertion ignores the purpose of the Free Exercise Clause — to guarantee religious toleration and protect small religious minorities.

The language of the Free Exercise Clause was derived from Maryland's 1649 Act Concerning Religion (commonly known as the "Toleration Act"). See Schwartz, The Bill of Rights: A Documentary History 90-94, 232, 1121 (1971). The Toleration Act broadly protected an individual from being "any ways troubled, molested or discountenanced for or in respect of his or her

religion nor in the free exercise thereof . . ."[11] Plainly, the 1649 law was protecting the belief and practice of small denominations, whose members were not to be impeded in any manner on account of their religious beliefs or practices. To read the Free Exercise protection, as the Solicitor General now reads it, as intended to secure greater rights for religions with large memberships than for those who have few adherents is to turn the Free Exercise Clause on its head. It is not anomalous to require governmental accommodations when the beneficiaries of those accommodations are so few that they are politically weak and their exemption has negligible effects on a government program. Striking that balance is precisely what religious toleration is all about. James Madison — the guiding hand behind the First Amendment — observed that freedom of religion

> arises from that multiplicity of sects which pervades America, and which is the best and only security for religious liberty in any society; for where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest.

Schwartz, The Bill of Rights: A Documentary History 796 (1971).

In considering the effects of a religious exemption it is, of course, proper to evaluate how many others similarly situated will be able to claim the same exemption. If the exemption may be claimed by so many others that the compelling governmental policy will be frustrated, it might be permissible to deny the exemption. That was the situation in *United States v. Lee*, 455 U.S. 252 (1982), where the Court concluded that the identical claim of religious exemption could be made by so many taxpayers that the tax-collection system would be destroyed.

---

11. Professor Schwartz notes, "Although the Toleration Act was limited in its protection to Christians, there was not, so far as we know, any persecution of Jews or others in the colony." *Id.* at 91.

The constitutional standard we advocate is not inconsistent in any way with the statements quoted by the Solicitor General from decisions such as *Regan v. Time, Inc.*, 104 S.Ct. 3262, 3272 n.12 (1984); *Clark v. Community for Creative Non-Violence*, 104 S.Ct. 3065, 3070-3071 (1984); and *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981). See Brief for the Appellants, No. 84-780, p. 36. In each of those cases, the Court observed that the full potential effect of a First Amendment exemption must be considered in determining whether the exemption is constitutionally mandatory; it is inadequate to consider only the effects of exempting the individual plaintiff.

By a parity of reasoning, we do not argue that in this case the Court is limited to considering whether military discipline or esprit de corps would be impaired if Captain Goldman alone were permitted to wear a yarmulke. A court must consider the effect of permitting yarmulkes to be worn by all Orthodox Jewish military personnel. Moreover, as the district court found, "[o]nce an exception is made for male members of the Jewish faith to wear yarmulkes, members of the other faiths who wish to wear skull caps must be permitted to do so" (Pet. App. 33a).

A court might even go beyond skullcaps and consider the effects of other small, religiously mandated deviations from the standard military uniform. That was, in fact, the focus of petitioner's attention during the trial of this case in the district court. The Air Force's expert witnesses were unable, however, to specify any actual servicemen, other than Orthodox Jewish personnel and an unidentified Sikh, who were members of religious faiths that required exceptions from the Air Force's Dress Code (J.A. 59, 96). Hence there is no evidence in this record that the burden of exempting or accommodating to religiously mandated deviations from the Dress Code have

a serious adverse impact on the Air Force. In such circumstances, the Free Exercise Clause mandates that religious liberty prevail.

IV.

THE MILITARY SERVICES DO NOT HAVE CARTE BLANCHE IN DEALING WITH MILITARY PERSONNEL'S CONSTITUTIONAL LIBERTIES

The Solicitor General appears to acknowledge that it would be constitutionally impermissible to prohibit yarmulkes in a civilian context. His Brief in Opposition in this case states (Br. in Opp., pp. 10-11; citations omitted):

> A uniform dress regulation of this sort would presumably not survive constitutional scrutiny outside the military, police, or analogous contexts, and would be subject to challenge in the private sector under Title VII of the Civil Rights Act of 1964. In the military, however, the right to select one's manner of dress, like the right to circulate petitions or to engage in disruptive expression, is circumscribed by the legitimate requirements of military discipline and order.

We have demonstrated in the preceding pages of this brief that wearing a yarmulke is a singularly innocuous and inoffensive religious observance and that the record wholly fails to support any assertion that military discipline or morale would be affected if yarmulkes are authorized to be worn by servicemen who feel conscientiously compelled to wear them. In fact, the record supports the district court's conclusion that the Air Force would *improve* discipline and morale if it allowed a religious exemption from its Dress Code.

The remaining question, however, is whether the military services are so far beyond the reach of ordinary

constitutional adjudication that no matter how insubstantial their showing in a judicial forum and no matter how remote the possibility of any real harm to the effectiveness of the military service, the Air Force's declaration of the need for absolute uniformity must be the very last word. That was, essentially, the conclusion of the court of appeals, which found no substance to any of the justifications cited by the Air Force but nonetheless deferred to the military's ultimate conclusion (Pet. App. 19a-20a).

A. Military Personnel Have Constitutional Rights.

In *Chappell v. Wallace*, 462 U.S. 296 (1983), this Court held that the unique structure of the Military Establishment barred damage lawsuits by enlisted military personnel alleging that their superiors had violated their constitutional rights. Nonetheless, the Court was careful to conclude its unanimous opinion with the following observation (462 U.S. at 304; citation omitted):

> Chief Justice Warren had occasion to note that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.

This case effectively tests that proposition. Petitioner initiated this action to be permitted to engage in the free exercise of his religious observance. If a district court is obliged to dismiss a Free Exercise of Religion claim brought against a military service simply because the service asserts — with no evidentiary support — that it is entitled to prohibit the religious observance "for the sake of enforcement," servicemen have, in fact, been "stripped of basic rights simply because they have doffed their civilian clothes." This specific case may relate only

to a small patch of cloth worn on a serviceman's head, but if the Air Force position is sustained, its importance far exceeds that modest religious observance. Under the standard of the court below, even the most fundamental religious observance, including worship itself, may be prohibited in the military simply to teach uniformity and discipline.

We recognize the legal principle articulated by this Court in *Parker v. Levy*, 417 U.S. 733, 758 (1974), that "the different character of the military community and of the military mission requires a different application" of the First Amendment than in civilian cases. It is, of course, true that "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Id.* But this Court began that very passage in *Parker v. Levy* with the observation that "members of the military are not excluded from the protection granted by the First Amendment." *Id.* There must, therefore, be both procedural and substantive avenues for asserting First Amendment claims against overly expansive military regulations.

This same constitutional principle — that First Amendment rights exist in the military but that the government's interests should be given greater weight in the military context — was articulated in *Brown v. Glines*, 444 U.S. 348, 354 (1980). The Court again said that "members of the military services are entitled to the protections of the First Amendment," while ruling that "[s]peech likely to interfere with . . . vital prerequisites for military effectiveness . . . can be excluded from a military base." The Court did *not* say, in either *Levy or Glines*, that any speech that the military service wishes to exclude, merely "for the sake of enforcement," may be excluded. Even under the *Glines* standard, the military must make some showing that the particular excluded speech is "likely to interfere with . . . vital prerequisites

for military effectiveness." In this case, as we have previously demonstrated, there is no showing whatever that the wearing of a yarmulke would interfere in any way with the discipline, morale or effectiveness of the Air Force.

B. Misunderstanding or Resentment By Other Servicemen Is Not a Justification for Denying Petitioner's Constitutional Rights.

General Usher testified that religious exemptions should not be granted in the military because servicemen who do not have a religious claim for exemption will resent the fact that the religionist is permitted to deviate from the Dress Code. He testified (J.A. 63):

> The point that I am making is that if you allow this example to stand up, you then begin to have to allow other examples.
>
> Or, you get into the situation where people point out to you, "There is somebody violating the regulation. Why do I have to adhere to that regulation or to another regulation?"

See also J.A. 41, 52.

The fact that others may misunderstand or resent an individual's exercise of his religious rights is not, however, reason to deny the right. It is well established that "constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963). *See also Palmore v. Sidoti*, 104 S.Ct. 1879, 1882 (1984); *City of Cleburne v. Cleburne Living Center*, 105 S.Ct. 3249 (1985).

The military's involvement in this matter does not legitimize private resentment of the exercise of First Amendment rights. Nor does invocation of terms such as "discipline and morale" change the underlying nature of the Air Force's asserted interest. When General George C. Marshall was asked to create an all-volunteer, racially

integrated unit in the army, he responded in a memorandum to Secretary Stimson (December 1, 1941) that racial segregation was "a social problem which has perplexed the American people throughout the history of this nation. The Army cannot accomplish such a solution and should not be charged with such an undertaking. The settlement of vexing racial problems cannot be permitted to complicate the tremendous task of the War Department and thereby jeopardize the discipline and morale." *See* Lee, *The Employment of Negro Troops in World War II* (Washington, D.C.: Office of the Chief of Military History, United States Army, 1966). The Air Force is making substantially the same argument when it asserts that petitioner's wearing of a yarmulke will not be understood by other servicemen and will thereby undermine morale and discipline.

The Air Force took the position in district court that if a court ordered it to accommodate to religious claims — as it had done in the cases of Jewish chaplains who asserted the right to wear beards in the Air Force — the resentment of fellow servicemen would be diminished. General Usher explained that it would be a "ready explanation that we ended up in court on their matters" (J.A. 68). This stance — that the military could more readily be ordered by a court to comply with a constitutional claim to the free exercise of religion than it could accommodate to that claim on its own — overlooks the Air Force's separate obligation to enforce the Constitution. If the First Amendment entitles petitioner to wear his yarmulke, the Air Force may not, simply to win the temporary good-will of its enlisted personnel, refuse to recognize that right and force petitioner to vindicate it in a judicial forum.

C. If Air Force Regulations Authorized a Religious Exemption, the Risk to Discipline and Morale Would be Eliminated.

The most puzzling aspect of the Air Force's adamant position in this case is that its discipline and morale argument is ultimately circular. It is important "for the sake of enforcement" to prohibit the wearing of a yarmulke only so long as the applicable regulation forbids a yarmulke to be worn. If, however, the regulations authorized religious exemptions, the wearing of a yarmulke would come within such an exemption and would not, therefore, be viewed as an unauthorized deviation from the regulations.

General Usher candidly answered questions directed to that point (J.A. 52):

> Q. I understand you to testify, General Usher, that the key reason why an exception or a departure from AFR 35-10 would affect the Air Force, is that other people would view it as a violation of military discipline and it would be impossible to draw the line. Is that correct?
>
> A. That is correct essentially.
>
> Q. In fact, if there were an exception for religious-belief-motivated departures from Air Force code, Air Force dress code, then such departures would be authorized by the regulations, would they not?
>
> A. Presumably.
>
> Q. And, consequently, people who would wear clothing such as a yarmulke, which is a departure from the Air Force code pursuant to that exception, would not be violating the Air Force regulation. Is that right?
>
> A. If specifically authorized, yes, sir.

The Air Force acknowledged in response to interrogatories that "although not specifically addressed in AFR 35-10," yarmulkes may be worn "during scheduled religious observances" and "while attending Sabbath or holy day services" (J.A. 25-26). Thus it is plain that the Air Force has, of its own accord, already recognized the validity of a religious exemption from the Dress Code for certain times and places.

By the same token, the Air Force has acknowledged the validity of exemptions from grooming requirements for those who are unable to shave because they suffer from pseudofolliculitis (ingrown hairs) (J.A. 24). This exemption — for a reason that is not constitutionally protected — apparently does not give rise to the feared disruption of discipline and morale that is cited in response to the wearing of a yarmulke. Yet it is impossible for the ordinary onlooker to know whether a beard is grown for medical reasons or because of a personal preference, while the wearing of a yarmulke is plainly a recognizable religious observance. And more men are likely to want to wear beards for personal reasons than are likely to seek to wear skullcaps for nonreligious reasons. Hence resentment from other military personnel is far more likely in the case of an exempted beard than in the case of an exempted skullcap. Nonetheless, the Air Force has readily allowed the medical exception while denying the religious.

These factors demonstrate that little harm, if any, would result from a regulatory exception from the Dress Code for religiously mandated articles of clothing such as skullcaps. Even under the greater leeway given to the military in recent decisions of this Court, there is no reason why such an exemption should not be authorized.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded with instructions to affirm the judgment of the district court.

Respectfully submitted,

Of Counsel:
DAVID J. BUTLER
BROWNSTEIN, ZEIDMAN & SCHOMER
1401 New York Avenue, Suite 900
Washington, D.C. 20005
(202) 879-5700

DENNIS RAPPS
NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS
450 Seventh Avenue, Suite 2203
New York, N.Y. 10001
(212) 563-0100

NATHAN LEWIN
(Counsel of Record)
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorney for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1985

S. SIMCHA GOLDMAN, PETITIONER

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

KATHRYN A. OBERLY
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Free Exercise Clause of the First Amendment requires the Air Force to create an exception to otherwise applicable uniform regulations so that an Orthodox Jewish officer may wear a skullcap (or yarmulke) while on active duty.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption of this case, the Secretary of the Air Force was named as a defendant in the district court and is a respondent in this Court.

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In the Supreme Court of the United States

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No. 84-1097

S. SIMCHA GOLDMAN, PETITIONER

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 734 F.2d 1531. The opinions on denial of rehearing en banc (Pet. App. 23a-27a) are reported at 739 F.2d 657. The opinion of the district court on the merits (Pet. App. 28a-34a) is unreported. The opinion of the district court granting petitioner's motion for a preliminary injunction is reported at 530 F. Supp. 12.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1984, and a petition for rehearing was denied on August 10, 1984 (Pet. App. 21a-27a). On November 1, 1984, the Chief Justice extended the time for fil-

ing a petition for a writ of certiorari to and including December 10, 1984 (Pet. App. 37a). On December 3, 1984, the Chief Justice again extended the time for filing a petition, to and including January 7, 1985 (Pet. App. 38a), and the petition was filed on that date. The petition was granted on June 17, 1985. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND REGULATIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

Air Force Regulation 35-10, ¶ 1-6, provides:

> Air Force members will wear the Air Force uniform while performing their military duties, except when authorized to wear civilian clothes on duty.

Air Force Regulation 35-10, ¶ 1-6.h(2) provides:

> Headgear will not be worn * * * [w]hile indoors except by armed security police in the performance of their duties.

STATEMENT

Petitioner S. Simcha Goldman is an Orthodox Jew who voluntarily joined the United States Air Force as a commissioned officer. In keeping with a practice and tradition of his religion, petitioner wears a head covering, usually a skullcap (or yarmulke), during waking hours. During the period at issue in this litigation, petitioner was on active duty at March Air Force Base in Riverside, California, serving as a clinical psychologist. Air Force Regulation (A.F.R.) 35-10 (July 18, 1980), which prescribes the official Air Force uniform, provides that "Air Force members will wear the Air Force uniform while performing their military duties" and that, with

exceptions not relevant here, "[h]eadgear will not be worn * * * [w]hile indoors" (A.F.R. 35-10, ¶¶ 1-6 and 1-6.h(2)).

In May and June of 1981, petitioner was ordered to cease wearing a yarmulke while in uniform. Petitioner refused to comply with his commander's order, and he was reprimanded. Petitioner then filed this suit in the United States District Court for the District of Columbia, challenging the application to him of A.F.R. 35-10 on First Amendment grounds and seeking damages and injunctive relief. The district court held that A.F.R. 35-10 was unconstitutional as applied to petitioner's desire to wear a yarmulke with the Air Force uniform. The court of appeals reversed.

A. The Air Force's Dress And Appearance Standards.

"The Air Force is a uniformed service," and "uniform wear greatly enhances the esprit de corps essential to an effective military force." A.F.R. 35-10, ¶ 1-1.a. The Air Force uniform is mandatory for all personnel on duty: "Air Force members will wear the Air Force uniform while performing their military duties, except when authorized to wear civilian clothes on duty." A.F.R. 35-10, ¶ 1-6. The Air Force uniform requirements are set forth in A.F.R. 35-10, a 190-page regulation that describes in minute detail all of the various items of apparel that constitute the Air Force uniform.[1] The regulation specifies and describes every garment that may be worn as a part of or with the uniform, and it provides mandatory instructions covering every subject from undergarments to the carrying of umbrellas. Air Force personnel may not add to or subtract from the prescribed uniform. A.F.R. 35-10, ¶ 1-6.f. The only individualized options authorized by A.F.R. 35-10 relate to certain items of jewelry and hair styles. Even with respect to these options, however, A.F.R. 35-10 specifies certain limitations. Facial

[1] We have lodged a copy of A.F.R. 35-10 with the Clerk of the Court.

hair, for example, is limited to mustaches, the corners of which may not extend beyond the mouth,[2] while men's jewelry is limited to rings and "neat and conservative" identification bracelets. A.F.R. 35-10, Table 1-1, line 16, and ¶ 1-12.b(1)(b).

A.F.R. 35-10 is, as in all other respects, extremely detailed on the subject of headgear. See, *e.g.*, A.F.R. Table 2-1, lines 12 and 13, ¶¶ 2-5.j, 4-3.c, 4-11, 4-13, and 4-14.a. With limited exceptions, the regulation directs that authorized headgear shall be worn only out of doors. A.F.R. 35-10, ¶ 1-6.h. In particular, the regulation provides that "[h]eadgear will not be worn * * * [w]hile indoors except by armed security police in the performance of their duties." A.F.R. 35-10, ¶ 1-6.h(2)(f).[3]

The mission of the Air Force, of course, is to "defend[] this nation against our enemies" by "conducting combat operations" (J.A. 31). At trial, Air Force

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[2] Beards are permitted only when authorized by a commander on the advice of a medical officer. A.F.R. 35-10, Table 1-1, line 1. This exception recognizes that not shaving is the accepted medical treatment for Pseudofolliculitis Barbae (ingrown facial hairs). Exemptions granted for the treatment of this condition are temporary (generally not in excess of 90 days) and, as such, do not constitute authorization for a permanent change in appearance standards. J.A. 24.

[3] An exception to this requirement may be authorized during military religious ceremonies; in such instances, the chaplain conducting the military religious ceremony is to provide guidance concerning the wearing of headgear. A.F.R. 35-10, ¶ 1-6.h(2)(d). No other deviations from the prescribed uniform are authorized for Air Force personnel whose religious practices include the wearing of special apparel.

However, Department of Defense Directive 1300.17 (June 18, 1985) authorizes commanders, in their discretion, (1) to designate living quarters in which religious articles may be worn with the uniform when such wear will not adversely affect unit cohesion, (2) to permit chaplains to wear the religious accoutrements of their faith in the performance of worship, and (3) to allow servicemembers to wear religious items that are not visible or otherwise apparent when worn with the uniform. See pages 14-15, *infra*.

witnesses explained why the extraordinarily detailed regulation of the official uniform worn by its personnel is deemed essential to the accomplishment of the Air Force's mission. Fundamental to the development of an effective combat force is a combination of teamwork, motivation, discipline, esprit de corps, and image (J.A. 32-33). To be successful in combat, soldiers must be trained to subordinate willingly and instinctively their personal preferences and interests in favor of the overall group mission (J.A. 33, 37). Major General William R. Usher, the Director of Personnel Plans at Air Force Headquarters, testified that "one of the most effective ways" of accomplishing the group mission is "that you put people in the same uniform; you standardize; you require them to be part of that organization, be part of that team which has been designed and put together as an effective combat unit" (J.A. 37). General Usher further explained that the standardized uniform encourages Air Force personnel to think of themselves in terms of their military obligations and serves to deemphasize the individual preferences and beliefs that may have divided soliders in civilian life: "Uniformity of dress, except for distinctions of rank, promotes the teamwork necessary for effective completion of the mission"; "[d]iscipline of enlisted personnel would be undermined if a departure [from the uniform regulation] is permitted [for] an officer"; and "[u]niform standards of dress engender pride and thus further the mission of the Air Force" (Pet. App. 30a; see also J.A. 35-39). Thus, the considered, professional judgment of the Air Force is that allowing "[d]eparture[s] from the uniformity standards of AFR 35-10 * * * would adversely affect the promotion of teamwork, counteract pride and motivation, [and] undermine discipline and morale" (Pet. App. 30a-31a).

Captain Reeves, an Air Force chaplain assigned to Maxwell Air Force Base, also testified at trial concerning a study prepared for the Army that describes, inter alia, the dress and appearance requirements and customs

of a number of religious groups. For example, Captain Reeves testified (J.A. 73-74) that male members of the International Society of Krishna Consciousness are required to wear tufts of hair, called sikhs, and that they place distinctive clay markings on their face, including "two parallel white lines that run from the forehead to the bridge of the nose." Other requirements noted by Captain Reeves were saffron robes for monks in the Satchidananda Ashram-Integral Yoga group, an Islamic prohibition against the wearing of clothes by males that show the imprint of the body and an Islamic requirement that females show only the face and hands and that portion of the body below the ankles. Yet another group requires its adherents to keep all of their hair, including their beards, and to wear a steel bracelet and a dagger. J.A. 74-75.

B. Petitioner's Experience In The Military.

Petitioner testified that a custom followed by some, but not all, devout Orthodox Jewish males is the wearing of a yarmulke (J.A. 200).[4] Yarmulkes are skullcaps that vary in size, color, and degree of ornamentation. The purposes of wearing a yarmulke, according to rabbinical authorities relied upon by petitioner, are both religious and cultural: "First, [wearing a yarmulke] was the Jewish way of showing reverence and respect. Secondly, uncovering the head was the custom of the Gentiles * * *.

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[4] Although petitioner's brief (at 5) suggests that the wearing of a yarmulke is required by Jewish law, he did not so testify at trial, and authorities introduced in the district court clearly demonstrate otherwise. See 1 G. Appel, *The Concise Code of Jewish Law* 34 n.3 (1977) (J.A. 261):

> Wearing a head covering as a sign of humbleness and reverence before God is a revered tradition in Judaism and a token of Jewish identity. One is nevertheless permitted, especially where one's livelihood is involved, to accept employment in a position where he will be required to go bareheaded, inasmuch as covering the head is prescribed by custom but is not demanded by law.

Covering the head thus served as a means of identification and a barrier against assimiliation" (J.A. 228).

From 1970 to 1972, petitioner served as a chaplain in the United States Navy. During that time, he wore his yarmulke without incident. J.A. 156-157.[5] In 1972, petitioner decided to study clinical psychology in graduate school. He "needed some funding" and therefore applied for and was accepted into the Armed Forces Health Professions Scholarship Program. J.A. 158-159. Under this program, petitioner was placed on inactive reserve status in the Air Force while he studied clinical psychology at Loyola University of Chicago. During his three years in the scholarship program, petitioner received a monthly stipend and an allowance for tuition, books, and fees. 10 U.S.C. 2120-2127; A.F.R. 36-17 (~~July 20, 1977~~ FEB. 1 1973). Participants in the program are required to serve a minimum of one year of active duty for each year of subsidized education. 10 U.S.C. 2123. Accordingly, in September 1977, after receiving his Ph.D. in clinical psychology, petitioner was assigned to active duty at the Mental Health Clinic at March Air Force Base Regional Hospital, near Riverside, California (Pet. App. 28a).

Petitioner continued his practice of wearing a yarmulke after entering on uniformed active duty with the

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[5] With the possible exception of time spent actually conducting religious services, petitioner's conduct was in violation of Navy regulations, which have always been comparable to the Air Force regulation at issue in this case. We note, however, that petitioner's tour of duty with the Navy roughly coincided with the tenure of Admiral Elmo Zumwalt as Chief of Naval Operations. Admiral Zumwalt sent a number of messages, commonly referred to as "Z-grams," to all Navy personnel; one such message (Z-57 (Nov. 1970)), while not dealing specifically with religious apparel, was widely interpreted by Navy personnel as authorizing a general relaxation of dress and appearance standards (see pages 37-38, *infra*). Because Z-57 was merely a "message" from the CNO, rather than a regulation, it was never formally rescinded, but, to the extent that it may have been misinterpreted as sanctioning petitioner's deviation from Navy regulations, it did not then, and does not now, represent Navy policy.

Air Force. However, petitioner kept a "low profile" on the base (J.A. 15). He rarely left his duty station in the clinic, did not take his meals in the hospital cafeteria, and wore his regulation service cap over his yarmulke when traveling to and from work (*ibid.*). Nevertheless, petitioner's superiors did receive occasional complaints about his violation of the uniform regulation. In response to the first such complaint, in 1978, the then-commander of the hospital was advised by the Surgeon General that the decision whether to take any action was up to the commander. The commander decided not to confront petitioner over the issue. *Ibid.* When a new commander took charge of the hospital in 1980, he questioned petitioner's violation of the uniform regulation, but, upon learning that his predecessor had permitted it, he too decided not to confront petitioner "at that time." *Ibid.*

In April 1981, however, petitioner appeared to testify as a witness at a formal court-martial wearing a yarmulke with the Air Force uniform. The circuit trial counsel registered a complaint about the incident. In response, the hospital commander consulted with his wing commander and others and learned that the wearing of a yarmulke, while a "highly recommended and encouraged" practice, is not required by Orthodox Judaism. J.A. 18. The hospital commander then called petitioner to his office and informed him that wearing religious garb in addition to the uniform was a violation of Air Force regulations. In an attempt to reach a mutually acceptable accommodation, the commander told petitioner that he could continue to wear his yarmulke when he was in the hospital, but that he would have to conform to uniform requirements in any of the other buildings on the base. J.A. 167-169.

Although virtually all of his time on the base was spent in the hospital (J.A. 205), petitioner rejected the proffered accommodation and informed his commander that he would continue to wear his yarmulke as he saw fit (J.A. 169). Attempts to settle the controversy having

failed, the hospital commander issued a written order on June 23, 1981, in which he directed petitioner to refrain from wearing religious garb while in uniform. This order pertained to the entire base and did not make an exception for hospital duty (J.A. 207). Petitioner refused to acknowledge receipt of the order and continued to wear his yarmulke (*ibid.*). The next day, the hospital commander issued petitioner a letter of reprimand for misconduct, stating that petitioner's actions "represent[ed] a flouting of military authority and [would] not be tolerated" (J.A. 208). In addition, the hospital commander withdrew a previously-issued recommendation that petitioner's tour of active duty be extended (J.A. 212-213).[6] This litigation followed.

C. The Decisions Below.

Petitioner filed suit in the United States District Court for the District of Columbia, challenging the application of A.F.R. 35-10 on First Amendment grounds and seeking damages and injunctive relief. The district court granted petitioner's motion for a temporary restraining order and later for a preliminary injunction to prohibit the Air Force from enforcing A.F.R. 35-10 to prevent him from wearing his yarmulke while in uniform during the pendency of the litigation. 530 F. Supp. 12 (1981).

After a trial on the merits, the district court acknowledged that the Air Force regards the uniform regulation as essential to the accomplishment of its military mission and that this military judgment is "based upon the experience of the Air Force in times of peace and in times of war" (Pet. App. 31a). Nevertheless, the district

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[6] Petitioner himself no longer wishes to extend his tour of active duty (J.A. 182). He is currently on inactive reserve status. In a separate lawsuit that has been stayed pending the outcome of this case, petitioner is challenging the denial of his application for active reserve status. *Goldman* v. *Sec'y of Defense*, No. 81-3197 (D.D.C. filed Dec. 31, 1981).

court rejected the professional military judgment of the Air Force on the ground that it was not "the product of an empirical study, psychological survey or the like" (*id.* at 33a). Without any studies of its own, the district court further concluded that making religious exceptions to the uniform regulation would "dissipat[e] hostility" and render the Air Force a "more humane institution" (*id.* at 31a). Accordingly, the district court entered a permanent injunction in favor of petitioner (*id.* at 35a).

The court of appeals reversed (Pet. App. 1a-20a). The court first recognized that the Air Force's judgment concerning the importance of maintaining uniform standards of appearance "was in the area of military governance, on which [the Air Force's] expertise is high and on which judicial competence is low" (*id.* at 16a). Accordingly, the court concluded that a high degree of deference was due the Air Force's judgment (*ibid.*). On the merits, the court noted that the particular type of uniform headgear chosen by the Air Force—for example, its shape and color—was necessarily arbitrary, but the court recognized that "enforcement of rules that certain hats may be worn only by certain people or at certain times serves the military purposes of identification and indoctrination into instinctive obedience" (*id.* at 19a). The court therefore refused to require the Air Force to permit religious exceptions to its uniform regulation out of deference to the Air Force's judgment that such exceptions would negate the benefits of strict uniformity and also would incur the resentment of servicemembers compelled to comply with the regulation in all respects (*id.* at 19a-20a).

D. Post-Litigation Proceedings.

On October 19, 1984, after the court of appeals denied petitioner's request for rehearing, Congress directed the Secretary of Defense to establish a study group "to examine ways to minimize the potential conflict between

the interests of members of the Armed Forces in abiding by their religious tenets and the military interest in maintaining discipline." Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 554(a), 98 Stat. 2532. The Act directed the Secretary, within 20 days of receipt of the report, to issue "appropriate implementing policy" (§ 554(d), 98 Stat. 2532).

Pursuant to this legislation, the Secretary formed the Joint Service Study Group and invited comments from the interested public. 49 Fed. Reg. 48596 (1984). The Study Group was directed to "address the issues of compliance with and modifications of uniform regulations, dietary restrictions, sabbath observance, and facial and body hair length practices," and to "consider the views of a broad spectrum of religious organizations and specialists outside the government." *Ibid.* The Secretary charged the Study Group, which was composed of the Chiefs of Chaplains of each of the Military Departments and a line officer from each service, with the task of "articulat[ing] an approach to these sensitive issues that will maximize morale and discipline as well as the opportunity for exercise of freely held religious beliefs by members of the Armed Forces." *Joint Service Study on Religious Matters*, App. B at A4 (Mar. 1985) [hereinafter cited as *Joint Service Study*].[7]

The Study Group's final report confirmed and expanded upon the conclusions expressed by the Air Force at trial in this case.[8] Based upon its investigation, the

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[7] We have lodged a copy of the *Joint Service Study* with the Clerk of the Court.

[8] Although the Study Group conducted extensive research, its final report recognized what the district court refused to acknowledge--that no "empirical study, psychological survey or the like" (Pet. App. 33a) can determine conclusively the potential impact on the military of exceptions to the uniform regulations. Instead, the "consensus among professional social scientists was that, in determining whether to recommend exceptions to dress and appearance, the Group must rely on 'institutional wisdom' evolved over years of

Study Group reported that "[c]ontemporary research in the social and behavioral sciences supports what military institutions have recognized for centuries: dress and appearance define who we are and what we are to ourselves and to others. Within the military such identification contributes significantly to building discipline, individual morale, unit cohesion, and service esprit de corps." *Joint Service Study*, at III-4.

Because of the unique character of the military mission, the Study Group concluded that the uniformed, military services cannot tolerate the variety of dress and appearance that characterizes civilian society. The Study Group reasoned that soldiers must be ready, without hesitation or discussion, to risk their lives on command. The degree of discipline that makes such instinctive obedience possible must, for the most part, be instilled in civilians who enter upon military service. *Joint Service Study*, at III-6 to III-7, III-9, III-17. The Study Group concluded that the military services' "extreme emphasis on uniformity" is a critical element in effecting this "rite of passage" from civilian to military society. *Id.* at III-7. As the Study Group explained (*id.* at III-4 to III-5 (citations omitted)):

> Wearing common uniforms induces the wearers to view themselves as part of a group larger than themselves. It is "a way of converting individuals and their feelings about themselves . . . from individuals into members of a . . . group." Uniformity not only directly imposes the discipline of the group, but, more subtly, instills the *self*-discipline necessary for the military member to perform effectively. In the course of this outward display of group membership, the individual servicemember develops a willingness to submit his or her individuality to the larger organization and thus thinks and acts differently.

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military experience combined, where possible, with such guidance as the social sciences might suggest." *Joint Service Study*, at III-8 to III-9.

> Another purpose of uniform dress and appearance is to reinforce the idea that military members *are* different from civilians—that their role is * * * "qualitatively different" from that of their civilian counterparts. Uniforms remind the men and women who wear them that they put aside certain personal freedoms when they joined the armed forces and that they have assumed special obligations inherent in the military's responsibility for the nation's defense. * * *
>
> At the same time uniforms set military people apart from civilians, they act as a cohesive bond within the services by instilling a common identity, by providing visual evidence of shared experience, and by reinforcing a sense of tradition. This group identification plays an essential role in the development of unit cohesion and institutional esprit de corps, which in turn contribute to military effectiveness.[9]

Mindful of its charge, the Study Group nevertheless considered the possibility of allowing religious exemptions to uniform requirements. The Study Group considered a range of options, including authorization for the wearing of so-called "unobtrusive" articles of religious apparel. The Study Group's conclusions confirmed the testimony of military professionals in the district court that such exceptions would undermine military effectiveness by tending to reinforce the individual's sense of being separate and distinct from the military and its purposes. *Joint Service Study*, at III-9. The Study Group also noted other serious problems with any policy that would permit the wearing of "unobtrusive" articles of religious apparel (*id.* at III-20 to III-21):

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[9] The Study Group's conclusions were bolstered by the results of polls conducted among more than 2,700 resident Professional Military Education students, including commissioned and non-commissioned officers. Of those surveyed, 88.5% thought that allowing exemptions for visible religious apparel would cause a very negative or negative impact on military effectiveness. Only 3.6% thought the impact would be positive or very positive. *Joint Service Study*, App. E, at A36.

> In an effort to accommodate the greatest number of people, the Study Group did consider the wear of "unobtrusive" articles (such as head coverings) and grooming exceptions (e.g., beards) away from hazardous areas. Such an option raised several questions. The first was how the services might determine what constituted "unobtrusive." Given the eclectic composition of the American military, what would be unobtrusive to some would be glaringly obvious to others. In addition, any exception to the norm would be viewed as precisely that: an exception by individuals who were putting personal considerations before the group. To allow some exceptions and not others would create the impression, indeed the reality, of favored treatment for selected faith groups. In addition to the impact of this inequity on cohesion and esprit, such an approach would raise legal questions as well.

Despite these problems, the Study Group recognized the responsibility of the Armed Forces to meet the religious needs of its members whenever possible. Accordingly, the Study Group recommended that servicemembers should be permitted to wear *non*-visible items of religious apparel with the prescribed uniform and that visible items of religious apparel generally should be permitted in the relative privacy of a soldier's living quarters. *Joint Service Study*, at III-21.

These recommendations were adopted for all Military Departments in Department of Defense (DoD) Directive 1300.17 (June 18, 1985).[10] The Directive allows commanders, in their discretion, to make limited exceptions from the uniform regulations for religious reasons. The Directive provides in pertinent part as follows:

> 1. * * * The Department of Defense places a high value on the rights of service members of the Armed Forces to observe the tenets of their respective religions. It is DoD policy that requests for accommo-

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[10] We have lodged a copy of this Directive with the Clerk of the Court.

dation of religious practices should be approved by commanders when accommodation will not have an adverse impact on military readiness, unit cohesion, standards, or discipline.

2. The following goals are to be used by the Military Departments in the development of guidance on the exercise of command discretion concerning the accommodation of religious practices. * * *

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b. The Military Departments should designate living spaces in which religious articles may be worn with the uniform when wear will not affect adversely unit cohesion;

c. Chaplains may wear religious accouterments with the uniform in the performance of worship and practices distinct to their faith group;

d. Subject to safety and health requirements, any religious item not visible or otherwise apparent may be worn with the uniform.

SUMMARY OF ARGUMENT

I. A. In support of his argument that the Air Force is required to grant him an exemption from A.F.R. 35-10, petitioner urges this Court to apply the "compelling governmental interest" and "least restrictive alternative" mode of analysis developed for Free Exercise claims in the civilian sector. See, *e.g.*, *Thomas* v. *Review Board*, 450 U.S. 707 (1981). But civilian precedents such as *Thomas* have no applicability in the military context. This Court has consistently recognized that the military is a separate community "without counterpart in civilian life" (*Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975)) and that, when the needs of the military so require, activities that are likely adversely to affect military interests may be regulated, even though the same activities, when engaged in by civilians, would be entitled to constitutional protection. See, *e.g.*, *Brown* v. *Glines*, 444 U.S. 348 (1980); *Parker* v. *Levy*, 417 U.S. 733 (1974).

The divergence between military and civilian society is at its sharpest in areas relating to the panoply of First Amendment rights that guarantee citizens the liberties essential to a self-governing people. Unlike civilian society, a " 'military organization is not constructed along democratic lines and military activities cannot be governed by democratic procedures * * *.' " *Greer* v. *Spock*, 424 U.S. 828, 843-844 (1976) (Powell, J., concurring) (quoting T. Emerson, *The System of Freedom of Expression* 57 (1970)). To the contrary, soldiers are expected to obey the directives of their superiors without question or hesitation, even when those orders may severely compromise a soldier's personal safety or comfort. And unswerving obedience to command arises not from rational discussion or conviction, but from discipline. A healthy respect for these unique needs of the military has led this Court to apply a different standard of review to constitutional challenges raised by military personnel than is applicable in the civilian context.

Although the Court has not attached a label to the standard of review it employs in military cases, *Brown* v. *Glines*, *supra*, most clearly exemplifies the prevailing approach. There, the Court engaged in no balancing, no weighing of interests, in concluding that "[s]peech *likely to interfere* with [the] vital military prerequisites [of loyalty, morale, and discipline] for military effectiveness * * * can be excluded from a military base" (444 U.S. at 354 (emphasis added)). The only caveat added by the Court was that expression should be regulated no more than is "reasonably necessary" to protect the substantial governmental interests at stake (*id.* at 355).

B. In addition to the special nature of military society, there is another factor that must inform the Court's review of petitioner's claim to a religious exemption from the Air Force's uniform regulation. In assessing the need for a particular regulation promulgated to establish and maintain a disciplined and well-ordered fighting force, the courts must accord great deference to

professional military judgments. See, *e.g.*, *Chappell* v. *Wallace*, 462 U.S. 296, 300-301 (1983); *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953). This deference is rooted partly in the express constitutional commitment of the governance of the nation's Armed Forces to the President and Congress and partly in the inability of civilian judges to determine the impact upon discipline that judicial second-guessing of command decisions might occasion. See, *e.g.*, *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).

C. This case involves a determination made by military professionals concerning the training of military personnel. It is the considered judgment of those military professionals that regulations dictating uniformity of dress will instill the discipline, morale, and esprit de corps essential to the accomplishment of the military mission—to protect the security of this nation. Consistent with established limits on judicial review of such military decisions, this Court's role is, first, to determine whether it is "likely" that exceptions to the military's uniform requirements will interfere with the military interests advanced by the Air Force. If so, the Court must also determine whether the scope of the uniform regulation is "reasonably necessary" to achieve those interests. *Brown* v. *Glines*, *supra*.

II. A. There can be no serious doubt that uniform dress and appearance standards serve the military interest of maintaining discipline, morale, and esprit de corps. In *Kelley* v. *Johnson*, 425 U.S. 238 (1976), the Court rejected a First Amendment challenge to a police department's dress and appearance code, noting that the "overwhelming majority" of police departments have uniform requirements and that such requirements serve the legitimate purpose of inculcating the esprit de corps deemed necessary for an effective police force. If uniformity serves to inculcate discipline, morale, and esprit de corps in police departments, if follows a fortiori that uniformity serves the same purposes in the nation's "uni-

formed services." This conclusion is supported by virtually all professional military personnel, by centuries of military experience in this and other countries, by civilian social scientists, and by common sense. Indeed, petitioner conceded as much in the court of appeals, and he has not argued otherwise in this Court.

This concession is fatal to petitioner's argument that the only interest of the Air Force in enforcing its uniform regulation is enforcement itself. Rather, enforcement is a necessary means to the undeniably critical end of molding soldiers into an effective fighting force. It is thus clear that exceptions to the Air Force's uniform dress and appearance standards are "likely to interfere" with the military interest in maintaining discipline, morale, and esprit de corps.

B. It is equally clear that the scope of the Air Force's uniform regulation is reasonably necessary to protect the military interests at stake. Petitioner argues that the regulation is overbroad and that the military interests in discipline and morale could be met even if he were allowed to deviate from the regulation. But petitioner's arguments amount to precisely the sort of second-guessing of professional military judgments that this Court has refused to countenance in the past.

For example, petitioner characterizes the yarmulke as an " 'unobtrusive' * * * benign religious observance" that, in today's society, is no more than "slightly idiosyncratic apparel" (Br. 9 (citation omitted)). We agree that, in civilian society, the wearing of a yarmulke is not generally an occasion for comment. But in the military, the smallest departure from the uniform dress code *is* an occasion for comment. It sets the wearer apart from his fellow soldiers and serves as a public assertion of individuality in a context in which cohesion and group identity are essential.

Like the district court, petitioner also challenges the Air Force regulation because it was not the product of a "scientific study" (Br. 25). The short answer to petitioner's argument is that the military is not constitu-

tionally required to perform "clinical" or "empirical" studies before it may enforce a personnel regulation. The military itself is a profession, and its institutional judgments, especially those relating to discipline and morale, have been refined by centuries of practical experience. Those judgments possess independent dignity and are entitled, within their sphere, to more respect than the speculations of members of other professions unacquainted with the peculiar constraints of military life.

Petitioner further argues that granting the exemption he seeks would have no adverse consequences for military discipline and morale because, for a period of years, no one objected to his wearing a yarmulke. Petitioner's assertion is factually inaccurate. But more important, the military need not demonstrate in each individual case that a departure from uniform standards has caused a breakdown in discipline and morale before it may enforce its regulations.

Finally, petitioner's argument, accepted by the district court, that exceptions to the uniform requirement would make the Air Force a "less rigid, more humane institution" (Pet. App. 31a) is totally beside the point. Moreover, it is difficult to imagine a judgment more outside the realm of judicial competence than the degree of "ridigity" and "humanity" appropriate to a Military Department.

III. Acceptance of petitioner's argument would create the further difficulty of forcing the military to choose between virtual abandonment of its uniform regulations and constitutionally impermissible line drawing. Petitioner's case is but one of many in which members of the Armed Forces have sought a religious exemption from the uniform requirement in order to wear turbans, unshorn hair, beards, swords, ankle length skirts, dreadlocks (long, braided hair), and kum kums (red dots worn on the forehead). Litigation over such requests has become increasingly frequent and, if petitioner's claim were accepted, could only be expected to increase.

The military would have no principled basis upon which to grant petitioner's request while denying others. Granting some religious exemptions to the uniform requirement but not others would undermine military morale and, indeed, would raise substantial Establishment Clause concerns. On the other hand, if the military were obliged to grant all exemptions claimed on religious grounds, it takes no great leap of imagination to picture a rag-tag band of soldiers bearing no resemblance to a "uniformed service."

ARGUMENT

THE FREE EXERCISE CLAUSE DOES NOT REQUIRE THE MILITARY TO GRANT RELIGIOUS EXEMPTIONS TO UNIFORM DRESS AND APPEARANCE REQUIREMENTS

A. The Standard For Evaluating Free Exercise Challenges In The Civilian Sector Has No Applicability In The Military Context.

The most striking aspect of petitioner's case in this Court is his unwillingness to acknowledge that his claim arises in the special context of a challenge to the military's authority over the conduct of its members.[11] Virtually all of petitioner's arguments are premised on the contention that the Court should analyze his claim under the standards enunciated in cases such as *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Wisconsin* v. *Yoder*,

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[11] Petitioner's brief is also noteworthy for its singular focus on the Air Force. While that is of course the particular Military Department out of which this case arises, *all* of the uniformed services have dress and appearance regulations comparable to A.F.R. 35-10. See A.R. 670-1 (Army); NAVPERS 15665C (Navy); MCOP-1020-34C (Marine Corps); and CG-471 (Coast Guard). The Court's decision in this case will apply to the regulations of all of the uniformed services. Moreover, all of the Military Departments are now subject to DoD Directive 1300.17 (see pages 14-15 *supra*), and that Directive does not provide for the type of accommodation that petitioner seeks.

406 U.S. 205 (1972); and *Sherbert* v. *Verner*, 374 U.S. 398 (1963). See, *e.g.*, Pet. Br. 12, 16, 20, 24-29. But these civilian precedents have no applicability in the military context. While we do not here contend that petitioner's challenge to A.F.R. 35-10 is totally unreviewable,[12] we do submit that judicial review of constitutional challenges to military regulations is *sui generis*. This Court has consistently recognized that military interests in discipline and morale are of paramount national importance and that activities that are likely to have adverse effects on those interests may be regulated, even though the same activities, when engaged in by civilians, would be entitled to constitutional protection. See, *e.g.*, *Brown* v. *Glines*, 444 U.S. 348, 354-357 (1980); *Parker* v. *Levy*, 417 U.S. 733, 758 (1974).

The reason that military personnel lack the same degree of constitutional protection afforded to civilians is a direct consequence of the fundamental distinctions between military and civilian society. "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." *Parker* v. *Levy*, 417 U.S. at 758; accord *Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981) (Due Process Clause "tests and limitations * * * may differ because of the military context."); Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. Rev. 177, 201 (1984) ("[A]s a matter of

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[12] But see, *e.g.*, *Khalsa* v. *Weinberger*, 759 F.2d 1411 (9th Cir. 1985), pet. for reh'g pending (dismissing as unreviewable the Army's refusal to permit a Sikh to enlist because he would be unable to comply with the Army's uniform regulations and noting that seven other circuits have adopted the test for nonreviewability of certain military decisions first articulated in *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971); see also Folk, *Military Appearance Requirements and Free Exercise of Religion*, 98 Mil. L. Rev. 53, 75-76 & nn. 142-147 (1982) (discussing nonreviewability of certain military decisions).

observation and history, the armed forces are a distinct subculture in which the individual is subordinated to the organization in a manner unlike any other government activity.").

Moreover, the divergence between military and civilian society is at its sharpest in areas relating to the panoply of First Amendment rights that guarantee citizens the liberties essential to a self-governing people. Unlike civilian society, a " 'military organization is not constructed along democratic lines and military activities cannot be governed by democratic procedures * * *. [M]ilitary decisions cannot be made by vote of the interested participants.' " *Greer* v. *Spock*, 424 U.S. 828, 843-844 (1976) (Powell, J., concurring) (quoting T. Emerson, *The System of Freedom of Expression* 57 (1970)). To the contrary, soldiers are expected to obey the directives of their superiors without question or hesitation, even when those orders may severely compromise a soldier's personal safety or comfort. As the Court stated in *In re Grimley*, 137 U.S. 147, 153 (1890):

> An army is not a deliberative body. * * * Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.

Unswerving obedience in extreme circumstances arises not from rational discussion and conviction, but from discipline: "[The accomplishment of the military mission implies] the fundamental necessity for obedience, and the consequent necessity for imposition of discipline." *Parker* v. *Levy*, 417 U.S. at 758. Without this discipline and obedience, an effective military organization could not be maintained, and the existence of other civil liberties, and the State itself, could be jeopardized. For these reasons, the Court has recognized that the full ambit of constitutional protections is not compatible with the maintenance of a military organization and that the special requirements of the military "may render per-

missible within the military that which would be constitutionally impermissible outside it." *Ibid.* See generally Hirschhorn, *supra*, 62 N.C.L. Rev. at 177.

Although the Court has not attached a label to the standard of review applicable to challenges to military regulations alleged to infringe fundamental civil rights,[13] the "rational basis" test most closely describes the Court's approach in practice. Cases considered by the Court in the last decade have included the military's criminal punishment (three years at hard labor) of an officer's spoken protest of the Vietnam War on the ground that the speech was "conduct unbecoming an officer" (*Parker* v. *Levy*, *supra*); the military's ban of speakers from military bases because of the political content of their speech (*Greer* v. *Spock*, *supra*); and the military's imposition of prior restraints on petitions to congressmen in the interest of maintaining order and discipline (*Brown* v. *Glines*, *supra*). None will doubt that civilian society may not be so regulated. Yet in each of these cases, the military regulations were upheld without any judicial "balancing of interests" or "strict scrutiny" of the asserted military interests.

Brown v. *Glines* most clearly exhibits the nature of this unique standard of review. There, the Air Force regulation at issue forbade the circulation of petitions by soldiers on a military base without approval of the base commander, who was authorized to suppress the distribution of material that he judged would endanger the " 'loyalty, discipline, or morale of members of the Armed Forces' " (444 U.S. at 350 (citation omitted)).

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[13] Indeed, it bears noting that the Court has expressly disavowed the utility of employing labels for the standards it applies in cases of this sort. *Rostker* v. *Goldberg* 453 U.S. at 69-70. We use the "rational basis" label not out of any conviction that a name is required, but only to make clear that petitioner's reliance (Br. 24-29) on concepts such as "strict scrutiny" and "compelling governmental interest" has no bearing in the military context.

The regulation had been enforced against a soldier who had solicited signatures on petitions to congressmen, complaining about the Air Force's grooming standards. The court of appeals invalidated the regulation on the grcund that it was overbroad and allowed commanders to suppress "'virtually all controversial written material'" (444 U.S. at 353 (citation omitted)).

This Court reversed. Although prior restraints on civilian speech may be justified only by the most certain evidence of immediate peril to the nation (see, *e.g.*, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (per curiam)), the Court in *Glines* engaged in no balancing, no weighing of interests. To the contrary, the Court recognized that "[l]oyalty, morale, and discipline are essential attributes of all military service," and held simply that "[s]peech *likely to interfere* with these vital prerequisites for military effectiveness therefore can be excluded from a military base" (444 U.S. at 357 n.14, 354 (emphasis added)). The only caveat added by the Court was that the regulation of such expression must "restrict speech no more than is *reasonably necessary* to protect the substantial governmental interest" (*id.* at 355 (emphasis added)).

Thus, rights that are fundamental in civilian society and that can be abridged only in the most compelling situations may be curtailed in the military if their exercise is "likely to interfere" with the maintenance of good order or the instilling of discipline in military personnel. Petitioner's claim must be evaluated in the light of this unique standard.[14]

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[14] Until the instant case, the only circumstances in which the Court has been called upon to consider the application of the Free Exercise Clause to members of the Armed Forces have been the conscientious objector cases. In those cases, the Court has unequivocally held that conscientious objector status is a matter of legislative grace, and not a constitutional right. See, *e.g.*, *United States* v. *MacIntosh*, 283 U.S. 605, 623-624 (1931), overruled on other grounds, *Girouard* v. *United States*, 328 U.S. 61 (1946); *In re*

2. Yet another factor must inform this Court's review of petitioner's challenge to the Air Force uniform regulation. Not only are the civilian precedents used to evaluate Free Exercise claims inapplicable because of the special nature of the military, but, in addition, the Court must afford a significantly heightened degree of deference to professional military judgments concerning the need for a particular regulation promulgated to establish and maintain a disciplined and well-ordered military force. As the Court recently noted in *Chappell* v. *Wallace*, 462 U.S. 296, 301 (1983), the character of this deference was "summed up" in *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953):

> "[J]udges are not given the task of running the Army. * * * The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."

This extraordinary deference is rooted partly in the express constitutional commitment of the governance of the nation's Armed Forces to the President and Congress

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Summers, 325 U.S. 561, 572 (1945); *Gillette* v. *United States*, 401 U.S. 437, 461-462 (1971); *Johnson* v. *Robison*, 415 U.S. 361, 383-386 (1974). For purposes of the instant case, the most significant fact about the conscientious objector cases is that, as one commentator has noted, "[t]he Supreme Court's approach in *Gillette* and *Robison* clearly indicates that *Sherbert*'s strict scrutiny analysis for free exercise claims does not apply to activities arising from Congress's power to raise and support armies." Folk, *Military Appearance Requirements and Free Exercise of Religion*, 98 Mil. L. Rev. 53, 68 (1982). As we shall demonstrate in the following sections of this brief, if religious scruples against the waging of war are insufficient to overcome the "Government's interest in procuring manpower necessary for military purposes" (*Gillette*, 401 U.S. at 462), they are surely insufficient to justify disobedience to the disciplinary requirements so essential to accomplishment of the military mission.

(U.S. Const., Art. I, § 8, and Art. II, § 2, Cl. 1)[15] and partly in the inability of civilian judges to determine the impact upon discipline that judicial second-guessing of command decisions might occasion. In *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973), the Court observed:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments * * *.

Accord *Rostker* v. *Goldberg*, 453 U.S. at 64-69.

Chief Justice Warren has echoed this view, noting that judicial deference to military judgments in areas affecting discipline has been the tradition of our country since its founding (Warren, *The Bill of Rights and the Military*, 17 N.Y.U. L. Rev. 181, 187 (1962) (emphasis added)):

> It is now indisputable that the tradition of our country, from the time of the Revolution until now, has

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[15] Judicial deference to military judgments seems particularly appropriate in light of the Framers' deliberate consideration of where best to repose civilian authority over the military. See, *e.g.*, *The Federalist No. 26*, at 168 (A. Hamilton) (H. Syrett & J. Cooke ed. 1962):

> The idea of restraining the legislative authority, in the means of providing for the national defence, is one of those refinements, which owe their origin to a zeal for liberty more ardent than enlightened * * *. [C]onfidence must be placed somewhere * * * [and] it is better to hazard the abuse of that confidence, than to embarrass the government and endanger the public safety, by impolitic restrictions on the Legislative authority.

See also *Rostker* v. *Goldberg*, 453 U.S. at 70-71 (citations omitted) (" '[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress * * * and with the President.").

> supported the military establishment's broad power to deal with its own personnel. *The most obvious reason is that courts are ill equipped to determine the impact upon discipline that any particular intrusion upon military authority may have.* Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal.

See also *Brown* v. *Glines*, 444 U.S. at 357 ("Because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline.").

The Court has employed the same reasoning in the *Feres* line of cases. See *Feres* v. *United States*, 340 U.S. 135 (1950). Most recently, in *United States* v. *Shearer*, No. 84-194 (June 27, 1985), the Court refused to permit the mother of a deceased soldier to maintain an action under the Federal Tort Claims Act alleging negligence on the part of the military in failing to prevent another soldier's fatal assault and battery of her son. Such a suit, the Court stated, "would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Shearer*, slip op. 7. The Court further explained (*id.* at 6):

> To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct.

3. In sum, this case involves judgments made by military professionals concerning the training of military personnel. It is the judgment of those military professionals that regulations dictating uniformity of dress will instill the discipline, morale, and esprit de corps essen-

tial to the accomplishment of the military mission. Consistent with established limits on judicial review of such military decisions, this Court's role is, first, to determine whether it is "likely" that exceptions to the military's uniform requirements will interfere with the military interests advanced by the Air Force. *Brown* v. *Glines*, 444 U.S. at 354. If so, the Court must also determine whether the scope of the uniform regulation is "reasonably necessary" to achieve those interests. *Id.* at 355. As we demonstrate below, these two inquiries must, in the circumstances of this case, be answered in favor of the Air Force. At that point, the Court's role is at an end, and petitioner's challenge to the uniform regulation must be rejected.

B. Exceptions To Military Uniform Dress And Appearance Standards Are "Likely To Interfere" With The Maintenance Of Discipline, Morale, And Esprit De Corps.

There can be no serious doubt that uniform dress and appearance standards serve the military interests of maintaining discipline, morale, and esprit de corps. In *Kelley* v. *Johnson*, 425 U.S. 238 (1976), the Court rejected a policeman's claim that a county dress and appearance code violated his right of free expression under the First Amendment and his guarantees of due process and equal protection under the Fourteenth Amendment. The Court noted that the "overwhelming majority" of police departments have uniform requirements, legitimately directed at promoting "a desire for the esprit de corps which such similarity [in appearance] is felt to inculcate within the police force" (425 U.S. at 248). The Court found this rationale for the dress code "so clear" that it held that the district court had correctly dismissed the complaint (425 U.S. at 247-248). Accord *Marshall* v. *District of Columbia Government*, 559 F.2d 726, 728 (D.C. Cir. 1977) (upholding police force uniform appearance regulations against Free Exercise chal-

lenge on ground that "requirements are directly related to discipline, uniformity and to esprit de corps").

If it is "so clear" that uniformity serves to inculcate discipline, morale, and esprit de corps in police departments, it follows a fortiori that uniformity serves the same purposes in the nation's "uniformed services."[16] This conclusion is supported by virtually all professional military personnel (see *Joint Service Study*, at III-13, App. E, at A35-A39), by centuries of military experience in this and other countries,[17] by social

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[16] Indeed, the court of appeals in *Kelley*, which had overturned the police dress code, did so based upon its view that "the 'unique judicial deference' accorded by the judiciary to regulation of members of the military" was not applicable to a county's regulation of its police force. *Kelley*, 425 U.S. at 246 (citation omitted).

[17] See, *e.g.*, H. Semmes, *Portrait of Patton* 8 (1955) (emphasis added)):

> Patton was a great stickler for discipline in uniform and in saluting because he knew that in these small things he would develop a hold on the men and officers working under him. * * * He often said, "If you can't get them to salute when they should salute, and wear the clothes you tell them to wear, how are you going to get them to die for their country? Often you will order them to carry out a dangerous task that may mean their lives. Be sure you have your hand on them in all things and they will be dependable when the heat is on."
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> * * * * *
>
> It is human to resent being told what to wear and how to wear it. Insistence on strict compliance with uniform regulations breaks down the barrier of resentment to discipline, possibly *more than anything else*. If men strictly obey the regulations about wearing the uniform, they can be held truly disciplined men. Discipline is the background of all military operations.

See also G. Patton, Jr., *War As I Knew It* 336, 362, 403-404 (1975). The same theme was sounded in W. Slim, *Defeat Into Victory* 542-543 (1956):

> At some stage in all wars armies have let their discipline sag, but they have never won victory until they made it taut again; nor will they. We found it a great mistake to belittle the importance of smartness in turn-out, alertness of carriage,

scientists,[18] and by common sense. Indeed, in the court of appeals, petitioner conceded that "the wearing of a uniform *is essential* to the maintenance of military discipline and *esprit de corps*" (Br. for Appellee 21 (emphasis added)), and he does not maintain otherwise in this Court.[19]

This concession is fatal to petitioner's argument (Br. 17, 18) that the only interest of the Air Force in enforcing A.F.R. 35-10 is enforcement itself. On the contrary, the authorities we have cited clearly demonstrate that enforcement is important not merely for its own sake, but as a means to the undeniably critical end of molding soldiers into an effective fighting force. This

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cleanliness of person, saluting, or precision of movement, and to dismiss them as naive, unintelligent parade-ground stuff. I do not believe that troops can have unshakable battle discipline without showing those outward and formal signs, which mark the pride men take in themselves and their units and the mutual confidence and respect that exists between them and their officers.

The Joint Service Study Group also considered military practices in foreign countries. It concluded that successful military forces that have not insisted upon uniformity of appearance are aberrations and that such organizations "represent special cases where a particular overriding factor (usually an immediate external threat) welded cohesion and esprit." *Joint Service Study*, at III-19.

[18] See, *e.g.*, *Dress, Adornment, and the Social Order* 127 (M. Roach & J. Eicher ed. 1965) (emphasis in original):

> Basically, the uniform was invented as a means to indicate the relationship of an individual to a group * * *. So many are the uses of uniforms today that we tend to forget the origin of the word (uni-form: one form, all alike). *By wearing the uniform of a particular group, a man shows by his clothing that he has given up his right to act freely as an individual but must act in accordance with and under the limitations of the rules of his group.*

[19] Petitioner also did "not challenge the discretion of the Air Force to choose the method it believes will best ensure the discipline and *esprit de corps* that it *rightfully deems essential* to the maintenance of an effective military force" (Br. for Appellee 8 (emphasis added)).

Court recognized the same point in *Brown* v. *Glines*, 444 U.S. at 354 (quoting *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975) (emphasis added)):

> Military personnel must be ready to perform their duty whenever the occasion arises. * * * *To ensure that they always are capable of performing their mission promptly and reliably*, the military services "must insist upon a respect for duty and discipline without counterpart in civilian life."

Because enforcement of a uniform requirement is directly related to the maintenance of discipline, morale, and esprit de corps, it follows that recognizing any exceptions to the uniform dress and appearance standards prescribed by A.F.R. 35-10 is "likely to interfere" with accomplishment of the military mission. By definition, a uniform requirement cannot coexist with exceptions to it.

C. The Scope Of The Air Force's Uniform Regulation Is Reasonably Necessary To Protect The Military Interests At Stake.

Having conceded that uniforms are essential to the maintenance of military discipline and esprit de corps, petitioner is forced to argue that the scope of the Air Force's uniform regulation is unreasonably broad and that the Air Force could allow yarmulkes to be worn without adverse consequences to the military interest in discipline and morale. Virtually all of petitioner's arguments represent precisely the sort of second-guessing of professional military judgments that this Court has refused to countenance in the past.

1. The chief premise of petitioner's overbreadth argument is his characterization of the yarmulke as an " 'unobtrusive' * * * benign religious observance" that, in today's society, is no more than "slightly idiosyncratic apparel" (Br. 9 (citation omitted)). Petitioner supports his characterization of yarmulkes as "unobtrusive" by stating that they are "commonly seen and accepted"

on university campuses, city streets, and other public places (Br. 11).

The government has no quarrel with the proposition that, in civilian society, the wearing of a yarmulke is not an occasion for comment or is, at most, "slightly idiosyncratic" behavior. But petitioner asks this Court to take this unremarkable observation well beyond the context of civilian society. Petitioner's argument depends on the proposition that practices considered "unobtrusive" in civilian society—where individuality in dress is the rule rather than the exception—are equally "unobtrusive" in a military setting. The analogy will not work, for in the military there are no clothing options. Detailed regulations specify which garments may be worn and further specify how and when they must be worn. The smallest departure from these strict specifications *is* an occasion for comment. It is common knowledge, for example, that a soldier's failure to button a button on his tunic can result in a stern rebuke from his superior. Cf. H. Semmes, *Portrait of Patton* 7-8 (1955). In other words, a "slightly idiosyncratic" unbottoned tunic is *obtrusive* in the highly regulated military community.

Furthermore, the entire premise of petitioner's argument is subject to serious question. Petitioner takes as a given the "unobtrusiveness" of a yarmulke, and he assumes that it is "generally understood to be a form of religious observance" (Br. 11). But the testimony in this very case demonstrates that not everyone is familiar with yarmulkes, because petitioner's co-workers and patients occasionally asked him what he was wearing (J.A. 166-167). Although petitioner's answers may have satisfied those who inquired, others—particularly petitioner's military subordinates who might not think it appropriate to question their superior's dress—could easily assume that petitioner was deviating from the prescribed uniform regulations purely for reasons of personal preference having nothing to do with his religious beliefs.

Thus, it cannot be assumed that other soldiers with whom petitioner comes in contact would appreciate that he is engaging in an " 'unobstrusive' * * * benign religious observance" (Pet. Br. 9 (citation omitted)). See pages 42-43 & note 25, *infra*.

From the military perspective, therefore, it requires no great effort to imagine the conspicuousness of a piece of unconventional headgear. The wearing of a yarmulke is a visible and significant departure from prescribed standards. As previously explained, it is the judgment of military professionals that such departures tend to make the wearer special and distinctive, setting him apart from other soldiers whose absolute conformity with the uniform regulations serves to confirm their military commitment. The wearing of a yarmulke is a public assertion of individuality in a context in which professional military officers have come to the studied judgment that uniformity is the best and perhaps the only way of instilling the discipline and esprit de corps essential to the fulfillment of the military mission. In a word, professional military officers have concluded that the wearing of yarmulkes and similar departures from the prescribed uniform are "obtrusive," because they are in conflict with military goals and purposes. See, *e.g.*, J.A. 58-59, 61 (testimony of General Usher).

Thus, petitioner's characterization of yarmulkes as "unobtrusive" is, in effect, merely a restatement of his disagreement with the judgment of military officers on the importance of strict and punctilious adherence to uniformity. That is, petitioner's assertion that yarmulkes are "unobtrusive" ultimately reduces to his contention that the judgment of military officers on the importance of adherence to uniformity is unreasonable. Unfortunately for petitioner, that is not his determination to make.

2. The district court conceded that the Air Force's judgment was "based upon the experience of the Air Force in times of peace and in times of war" (Pet. App.

31a). But the district court was unwilling to rely on the Air Force's experience, stating that conclusions "based * * * on the personal beliefs and assumptions of Air Force officials"—even those with "expertise" in the area—"are inadequate to withstand constitutional scrutiny" (*id.* at 33a).[20] Petitioner, contending that the Air Force's judgment was not based on a "scientific study" (Br. 12), resurrects this unprecedented analysis.

Even if it were possible to validate the Air Force's judgment by psychological or sociological tests and studies (but see note 8, *supra*), the short answer to petitioner's argument is that it is neither constitutionally required nor appropriate to insist that the military perform clinical or empirical studies before it may enforce a regulation such as A.F.R. 35-10. The military is itself a profession, and its institutional judgments, especially those relating to discipline and morale, have been refined by centuries of practical experience. Those judgments possess independent dignity and are entitled, within their sphere, to more respect than the speculations of members of other professions unacquainted with the peculiar constraints of military life. This Court therefore should re-

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[20] The district court would have found the Air Force's judgment "supportable" if it had "been the product of an empirical study, psychological survey or the like" (Pet. App. 33a). We note that such a study has now been performed. See pages 10-15, *supra*. At the same time, however, it is important to stress that studies and surveys are not constitutionally required before the Military Departments may enforce regulations of the sort at issue in this case. Thus, the *Joint Service Study* is significant not because it fills a void found by the district court, but because it reaffirms the constitutional commitment to *Congress* of the power to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8. In the exercise of that power, Congress may, of course, direct the military to study a particular issue. If it so chooses, Congress may go further, directing the military to take whatever action it deems appropriate in light of the study. It is quite a different matter, however, for the judiciary to refuse to accord deference to professional military judgments because a *court* thinks that a study would be desirable.

ject petitioner's request for judicial second-guessing of a decision of an admittedly military character merely because it lacks a "scientific"—*i.e.*, nonmilitary—basis. See *Chappell* v. *Wallace*, 462 U.S. at 302 (quoting *Gilligan* v. *Morgan*, 413 U.S. at 10); cf. *Parker* v. *Levy*, 417 U.S. at 763 (Blackmun, J., concurring) ("The subtle airs that govern the command relationship are not always capable of specification."). As the court of appeals observed, "the Air Force's judgment on this issue is entitled to deference because it is within its expertise and outside ours" (Pet. App. 19a-20a).

Moreover, the Air Force has persuasively explained why the particular military judgment at issue here is reasonably necessary to maintain discipline and morale. For example, the Air Force is plainly correct in concluding that the wearing of yarmulkes (or any religious garb not authorized by regulation) would set the wearers apart from military personnel who do not engage in such practices. It would make them a distinct class, the nature of which would not be based upon military distinctions, such as rank.[21] Petitioner loses sight of the fact that separateness generated by individual preferences—whether religious or otherwise—is precisely what the military seeks to deemphasize through its uniform regulations. Military entities are intended to function as units, and unit cohesion is possible only when the individuals habitually and willingly subordinate their personal tastes and interests to the purpose of the combat group. In sum, "idiosyncratic" practices that emphasize individuality are "functional[ly] and symbolic[ally] incompatib[le] with the 'specialized [military] society separate from civilian society.'" *Greer* v. *Spock*, 424 U.S. at 844 (Powell, J., concurring) (quoting *Parker* v. *Levy*, 417 U.S. at 743).

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[21] This conclusion is shared by petitioner's authorities, who, discussing the historial roots of the tradition of wearing yarmulkes, observed that "uncovering the head was the custom of the Gentiles * * *. Covering the head thus served as a means of identification and a *barrier against assimilation.*" J.A. 228 (emphasis added).

3. Petitioner also argues (Br. 13-15) that wearing a yarmulke has no adverse consequences for military discipline or morale, because "no one objected to his wearing a yarmulke and, other than a few inquiries by interested co-workers or patients, it caused little comment." Petitioner's contention is both inaccurate and irrelevant. First, it was exactly the fact of complaints from other military personnel that led to the order requiring petitioner to conform to the uniform regulation. In the highly formal atmosphere of a military court-martial, petitioner's unconventional headgear led to a complaint by an officer of the court. J.A. 15. Moreover, the Air Force disclosed to petitioner that, in 1978, the hospital commander received a complaint from a non-commissioned officer, who stated that "several of the younger Air Force members were upset that they were required to live up to standards of dress and [g]rooming while Capt. Goldman was not." J.A. 22.

More important, the military is not required to demonstrate in each individual case that a departure from uniform standards has caused a breakdown in discipline or morale before it may enforce its regulations. See *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, No. 84-312 (July 2, 1985), slip op. 20-21; *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 52 n.12 (1983) (citing *Greer* v. *Spock*, *supra*).[22]

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[22] Accordingly, petitioner's alternative contention (Br. 12) that the Air Force's judgment must be supported by "actual experience" before it can provide a basis for the regulation is totally unsupported by precedent. Apparently, petitioner would require the military to permit a practice and allow it to continue until it actually caused a degeneration of discipline and morale. The Court has never imposed such a requirement on the Armed Forces. For example, "[s]peech *likely* to interfere with [morale and discipline] * * * can be excluded from a military base." *Brown* v. *Gline*, 444 U.S. at 354 (emphasis added). See also *Greer* v. *Spock*, 424 U.S. at 840 ("[N]othing in the Constitution * * * disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops * * * un-

Significantly, Congress has taken note of the serious consequences that may flow from a general relaxation of uniform dress and appearance standards. In its investigation of the causes of serious riots that took place aboard two aircraft carriers during the Vietnam War (the U.S.S. *Constellation* and the U.S.S. *Kitty Hawk*), a special subcommittee of the House Armed Services Committee concluded that the Navy's authorization of individual variations in uniform dress had been a contributing factor in the breakdown of discipline on the carriers (House Comm. on Armed Services, *Report by the Special Subcomm. on Disciplinary Problems in the U.S. Navy*, H.A.S.C. 92-81, 92d Cong., 2d Sess. 17682 (1973)):

> The current relaxation of the standards of appearance for Navy men has caused a lessening in the pride that some sailors take in their appearance and, thus, in their service.
>
> Admittedly, Z-57 and subsequent clarifying messages concerning the standards of appearance, were not designed to permit Navy personnel to become sloppy and slovenly in their appearance and grooming. Nonetheless, such has been the effect.
>
> [T]he subcommittee received clear and irrefutable evidence that men of the naval service do not present the smart appearance that once was their unique trademark.
>
> While this has undoubtedly been as a result of individual abuse of relaxed regulations, it has, in fact, caused a service-wide problem for all Navy personnel. Until such time as there is insistence on clear-cut standards for a smart appearance while in

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der his command."). In truth, petitioner's "actual experience" requirement would be totally unworkable, because it would be virtually impossible for the military to show a clear cause-and-effect relationship between relaxation of its uniformity standards and a breakdown in discipline and morale (see note 8 *supra*). Furthermore, the showing that petitioner would require could only be made *after* the military—and hence the nation—would have suffered irreparable harm.

> the uniform of the United States Navy, the general morale and discipline will be adversely affected.

These legislative findings are entitled to great weight (see *Rostker* v. *Goldberg*, 453 U.S. at 72), and they negate petitioner's claim that the Air Force must demonstrate an actual breakdown in discipline attributable to him before it may require his compliance with the uniform regulation.

4. Although petitioner does not stress the argument, it bears noting that the military interests at stake are no less weighty simply because petitioner was serving in a noncombat position at a hospital. The Court recognized this point in *Brown* v. *Glines*, 444 U.S. at 356-357 n.14 (citations omitted):

> [T]hose restrictions necessary for the inculcation and maintenance of basic discipline and preparedness are as justified on a regular base in the United States, as on a training base, or a combat-ready installation in the Pacific. Loyalty, morale, and discipline are essential attributes of all military service. Combat service obviously requires them. And members of the Armed Services, wherever they are assigned, may be transferred to combat duty or called to deal with civil disorder or natural disaster.

As the *Joint Service Study* recognized, the alternatives to such flexibility in assignments are unacceptable (*id.* at III-16 to III-17):

> The services could assign individuals granted [dress and appearance] exceptions only to duties and locations where military requirements would *never* impinge upon their religious tenets. Alternatively, the services could agree to assign such an individual only to duties for which his exception would not, under normal circumstances, create a safety hazard or impinge upon his ability to accomplish the mission * * *.
>
> To adopt either of these approaches would complicate further the assignment processes of all the

> services by limiting the career fields into which people could be placed and by reducing flexibility within the personnel system.
>
> In a more general sense, adoption of assignment restrictions of this type would, in essence, create two classes within the military: the majority, subject to all the demands the military makes on its members (including worldwide assignment and the possibility of serving in a combat environment), and a visible minority, exempt from certain of the more onerous demands of the institution but eligible for all of its benefits. The impact of such an arrangement on the attitude of both groups can only be speculated, but it seems likely that the overall effect would harm military esprit de corps.

Furthermore, even if noncombat servicemembers were never transferred to combat positions, military history teaches that the need to instill instinctive obedience to command remains the same (Hirschhorn, *supra*, 62 N.C. L. Rev. at 226 (footnotes omitted; emphasis added)):

> The purpose of noncombat personnel is to provide reliable support services to combat units. * * * If the support components of an army are not as subject to the commander's will as are the combat components, they may withdraw whenever they find their situation to be too far from home, too dangerous, or not remunerative enough. * * * The commander whose supporting personnel were under military obligations of obedience and attendance had an advantage over an opponent with only an army of combat troops. * * * *Regardless of the particular duties he performs, the noncombat serviceman is a means to the same end as the combatant. He may not face as much danger, but the armed forces have the same reason to induce him to comply willingly with the requirements of his job.*

Thus, the subordination of the individual essential to the military mission can be attained only if it is a constant throughout the servicemember's career; inculcation

of the discipline necessary to fight a war cannot await the outbreak of hostilities. In the military setting, it is simply unrealistic and antithetical to the goals of the mission to allow "minor" deviations from absolute requirements, regardless of the function a particular servicemember performs. Congress itself recognized this fact in its investigation of the incidents aboard the U.S.S. *Constellation* and the U.S.S. *Kitty Hawk* (H.A.S.C. 92-81, *supra*, at 17683):

> Military discipline demands nothing less than immediate response to orders. The need for this immediacy is obvious in situations where lives are at stake. To demand a similar response during routine operational [or] "minor matters is essential to proper training for emergency situations and appropriate responsiveness to commands which may be given in wartime.

5. Petitioner makes much (Br. 21-22) of the district court's finding that the allowance of religious exceptions to the uniform standards might "enhance the effectiveness of the Air Force" by making it appear to be a "less rigid, more humane institution" (Pet. App. 31a). It is difficult to imagine a judgment more outside the realm of judicial competence than the degree of "rigidity" and "humanity" deemed necessary by a Military Department. Petitioner's contention (Br. 21) that religious exemptions would be "desirable" is thus totally irrelevant to the issue in this case.

In any event, the evidence upon which petitioner relies, even if it were remotely relevant to this Court's consideration of the question presented, does not support petitioner's argument. Dr. Samuel Levinson, a retired Army psychologist, did testify that, in his personal opinion, religious exemptions from the uniform requirements would be "beneficial" to the Air Force (J.A. 134). But the basis for his opinion serves only to confirm the Air Force's

judgment that deviations from the prescribed uniform would emphasize the individuality of servicemembers, even though it is the Air Force's considered judgment that, in the military setting, individuality must be subordinated to the group mission. Dr. Levinson testified that dress and appearance exceptions "would reflect the acceptance of pluralism, of flexibility, of [humaneness] in the system, of recognizing that there are reasonable differences * * * and *it is okay to be somewhat different*" (J.A. 136 (emphasis added)). Dr. Levinson's testimony therefore supports the Air Force's central premise, which is that the wearing of yarmulkes and other religious garb is by no means "unobtrusive," but would instead draw attention to "certain differences" (J.A. 134) among military personnel.

Dr. Levinson, of course, disagreed with the Air Force personnel experts who testified at trial and who participated in the *Joint Service Study*.[23] Dr. Levinson believed that an Air Force organized along different lines—one that did not stress uniformity and that was not concerned with whether military personnel "buttoned three buttons or four or wore some little bit here or there on the uniform as part of some identification, some identity issue"—would be more effective. J.A. 141.[24] Whatever the merit

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[23] Dr. Levinson was not himself a personnel expert, nor had he ever had any command experience. J.A. 137-139.

[24] For example, Dr. Levinson described Admiral Elmo Zumwalt's relaxation of Navy regulations so as to permit beards as a "brilliant psychological move" (J.A. 128). When confronted with the fact that the Navy has since repudiated that policy, Dr. Levinson stated only that he viewed the change as "a function of the conservative wave that has come along with the conservative politics of the Reagan administration" (J.A. 137); he had no "empirical" or "clinical" studies of his own to support his views on the desirability of the initial Navy experiment (*ibid.*). Similarly, Dr. Levinson dismissed as unproven congressional findings that lax enforcement of

of Dr. Levinson's position, it unquestionably involves fundamental and far-reaching policy choices of extraordinary importance to the structure of the military. This Court, however, has never taken it upon itself to determine, as petitioner urges, whether a more "flexible, pluralistic, and humane" Air Force could better accomplish that service's unique task. Cf. *Kelley* v. *Johnson*, 425 U.S. at 248 ("Neither this Court, nor the Court of Appeals, nor the District Court is in a position to weigh the policy arguments in favor of and against a rule regulating hairstyles as a part of regulations governing a uniformed civilian [police] service."). In sum, petitioner's contention that the Air Force itself would benefit from accommodating his religious request simply has no bearing on the proper resolution of this case.

6. Petitioner also objects (Br. 39-40) to the Air Force's concern that soldiers who are required to conform absolutely to the service's dress and appearance regulation are likely to resent what they may perceive as unequal and favored treatment for those in petitioner's position. Indeed, petitioner goes so far as to suggest (Br. 8; see also *id.* at 39-40) that for the Air Force to take such potential resentment into account is tantamount to "the now discredited World War II justification for racial segregation in the military"—that is, that a bigoted person's resentment of a black soldier's race is not a permissible basis upon which to deny the black soldier his rights.

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uniform regulations had led to disruptions aboard the U.S.S. *Kitty Hawk* (see pages 37-38 *supra*). J.A. 141-142.

In any event, Dr. Levinson's views on military accommodation have in fact been tested. The Army, on an experimental basis, permitted members of the Sikh religion—a sect with a strong military tradition and, in this country, relatively few members—to wear mandated items of religious apparel (turbans, unshorn hair, beads, and religious bracelets). The Army was forced to terminate this exception when "it became [apparent] that it might have to grant significant numbers of additional exceptions that would cause a detrimental impact on the Army's ability to perform its mission." Folk, *Military Appearance Requirements and Free Exercise of Religion*, 98 Mil. L. Rev. 53, 62 (1982).

The weakness of petitioner's position is demonstrated by his resort to this strained analogy. The Air Force is not here arguing that Orthodox Jews—or members of any other religion—should be treated differently because of their religion. Rather, the Air Force seeks only to treat Orthodox Jews exactly as it treats all other soldiers. It is petitioner who seeks favored status by asking to be relieved of one of the burdens of military service—strict adherence to uniform requirements—in order to satisfy a personal, nonmilitary (albeit religious) preference. Compare *United States* v. *Lee*, 455 U.S. 252, 264 n.3 (1982) (Stevens, J., concurring) (*Thomas* and *Sherbert* may be viewed "as a protection against unequal treatment * * * for the members of the religious sect"), with *Braunfeld* v. *Brown*, 366 U.S. 599, 608-609 (1961) (exemption for Jewish merchants from Sunday-closing law might provide them with a competitive advantage over merchants unable to claim a similar exemption). In these circumstances, it was not at all unreasonable for the Air Force to consider, among numerous other factors, the resentment of soldiers who would not themselves be entitled to any exemptions from the burdens of military service. See J.A. 41-42; see also *Joint Service Study*, at III-11 to III-12.[25]

D. Acceptance Of Petitioner's Argument Either Would Spell An End To Uniformity Or Require The Military To Engage In Impossible And Impermissible Line Drawing.

1. In addition to his emphasis on the "unobtrusiveness" of yarmulkes, petitioner stresses that "[t]here is nothing

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[25] As General Usher pointed out, the problem of resentment is particularly acute because of petitioner's status as an officer. "[I]f you allow this kind of a deviation on the part of an individual, particularly by an individual who is an officer and who is meant to be the epitome of a standard, the example, then it is very difficult then to enforce other kinds of standards or the dress standard itself on other people that are members of the Air Force by supervisors and commanders." J.A. 42.

intrinsically desirable about wearing a skullcap or any other religiously mandated apparel" (Br. 17). Hence, petitioner argues that "there is no reason to presume" that religious exemptions from the uniform requirement "would be invoked by many servicemen" (*ibid.*). Contrary to petitioner's argument, however, his is not an isolated case. Indeed, this case is but one of several recent or pending cases in which persons have argued that the military must grant exemptions from uniform requirements in order to accommodate a variety of ritual, religious practices.[26] In addition, many requests for exemptions from the uniform requirements have been denied without litigation. We are advised by the Army that it has received and denied requests for religious exemptions to its uniform requirements that would permit the wearing of turbans, unshorn hair, beards, swords, ankle length skirts, dreadlocks (long, braided hair worn by Rastafarians), and kum kums (red dots worn on the forehead by Hindus). Exemptions have been requested from members of the Christian, Jewish, Muslim, Sikh, Hindu, Rastafarian, and Native American faith groups. See *Joint Service Study*, at I-14, I-36 n.19. Nor have requests for exemptions been limited to isolated, individual cases. For example, subsequent to the court of ap-

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[26] See, *e.g.*, *Khalsa* v. *Weinberger*, 759 F.2d 1411 (9th Cir. 1985), pet. for reh'g pending (turban, unshorn hair, and beard, Sikh); *Sherwood* v. *Brown*, 619 F.2d 47 (9th Cir.), cert. denied, 449 U.S. 919 (1980) (turban, Sikh); *M. Bitterman* v. *Sec'y of Defense*, 553 F. Supp. 719 (D.D.C. 1982), appeal pending, No. 83-1177 (D.C. Cir.) (yarmulke, Orthodox Judaism); *B. Bitterman* v. *Weinberger*, dismissed, No. 83-3288 (D.D.C. Feb. 3, 1983) (unshaven beard and yarmulke, Orthodox Judaism); *Kirschenbaum* v. *Sec'y of Defense*, dismissed, No. 84-1302 (D.D.C. Apr. 24, 1984) (yarmulke, Orthodox Judaism); *Taylor* v. *Alexander*, No. C-1-80-417 (S.D. Ohio filed Aug. 22, 1980) (unshorn hair, Christian). See also *United States* v. *Haywood*, 19 M.J. 675 (A.F.C.M.R. 1984) (refusal to wear tight-fitting clothing, Muslim); *Shy* v. *Alexander*, dismissed, No. CV-LV-84-141-RDF (D. Nev. May 31, 1984) (refusal to salute flag or female officers, Shiloh-Christian).

peals' decision in this case, 51 members of a Pentecostal church in Junction City, Kansas, all of whom had been involuntarily separated from the Army because of their religious practices concerning apparel, requested that those practices be accommodated. Among other things, they asked that men be permitted to keep their shirtsleeves buttoned to the wrist at all times, not be required to go bare-chested, and not be required to wear shorts in the presence of females. The females in the group requested permission to be excused from wearing fatigue trousers or other types of men's clothing. See App., *infra*, 1a-3a. It is clear, therefore, that petitioner's case is not unique.

Despite these example of the extent of the problem confronting the Armed Forces, petitioner contends that the Air Force "did not show * * * that if a religious exemption were available it would be claimed by enough servicemen to have any impact on the military" (Br. 7). Petitioner's assertion is incorrect. The Air Force introduced at trial U.S. Dep't of the Army *Pamphlet No. 165-13-1, Religious Requirements and Practices of Certain Selected Groups: A Handbook Supplement for Chaplains* (1980) [hereinafter cited as *Chaplains' Handbook*].[27] This handbook, prepared "in order to provide information useful for Chaplains on the beliefs and practices of certain religious groups" (*id.* at i), discusses seven groups of religions, with 47 subgroups, many of which have traditions or requirements involving ceremonial religious garb. The 47 subgroups were selected for inclusion in the handbook out of the more than 1,200 religious denominations in the United States on the basis of the likelihood that military chaplains would encounter members of the selected groups in the performance of their duties (*id.* at ii).

Thus, the varieties of religious dress about which the Air Force testified in the district court (see pages 5-6, *supra*) are not limited to obscure sects, of academic in-

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[27] We have lodged a copy of the *Chaplains' Handbook* with the Clerk of the Court.

terest only. Rather, the empirical premises of the *Chaplains' Handbook* establish that, in all probability, Armed Forces Chaplains will have dealings with military personnel whose religious practices include wearing one's hair drawn to a tuft (a "sikh"); shaving the head; not shaving any body hair; marking the face with white clay lines or red dots; wearing various forms of headgear, including turbans and skullcaps; wearing robes of various colors and shapes; wearing jodhpurs; refusing to wear form-fitting clothing; refusing to wear clothes that do not cover the face; and a myriad of other variations.[28]

2. It should be obvious that the number and variety of potential exemptions, if granted, would spell an end to uniformity—the raison d'etre of the regulation at issue. No speculation is required to conclude that members of the various religious sects identified in the *Chaplains' Handbook* would indeed regard a uniform exception as "desirable" (Pet. Br. 17) and seek to exercise it—especially when many of the religious practices identified in the *Chaplains' Handbook* are regarded by their adherents as mandatory. As the Court noted in *Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640, 653 (1981), those entitled to engage in a particular practice will " 'in all probability' " do so if prohibitions against it are lifted.

It is also worth noting that the *Chaplains' Handbook* studied only the apparel requirements mandated by centrally-organized religions. Not surprisingly, however, idiosyncratic beliefs of particular churches or individuals within churches likewise have led to religiously-motivated requests for exemptions from the uniform requirements. See *Taylor* v. *Alexander*, No. C-1-80-417 (S.D. Ohio filed Aug. 22, 1980) (personal belief that New Testament requires unshorn hair); cf. *Thomas* v. *Review Board*, 450 U.S. at 715-716 ("[T]he guarantee of free exercise is not

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[28] The findings of the *Chaplains' Handbook* were reiterated in the *Joint Service Study*, App. C, at A6 to A25.

limited to beliefs which are shared by all of the members of a religious sect."). And the possibility that individuals would seek to indulge or create such idiosyncratic beliefs is even more likely in the military than in civilian life, because of the natural inclination many servicemembers might feel to seek out ways in which to resist the uniformity and regimentation imposed by authority. See note 17, *supra*.[29]

3. At the same time, it is equally obvious that any attempt by the military to follow the suggestion of the district court (Pet. App. 33a) to allow religious exemptions only for members of religions who wish to wear skullcaps, or petitioner's apparent suggestion (Br. 35) to allow religious exemptions only for the apparel worn by members of established, conventional religions,[30] while

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[29] In a similar vein, Congress recognized the potential difficulty of "how to distinguish between practices that stem from genuine faith and practices that could be used simply as a challenge to military discipline or as an excuse for failure to comply with legitimate orders." H.R. Rep. 98-1080, 98th Cong., 2d Sess. 294 (1984). Congress directed the Joint Service Study Group to answer this question. The Study Group, based upon the military's "[e]xperience with conscientious objector claims since development of the present constitutional standard of what is religious," concluded that it would be virtually impossible to distinguish sincere from insincere claims. *Joint Service Study*, at I-27 to I-28.

[30] Although the facts of this case concern only yarmulkes, petitioner argues for a decision that would require the military to grant exceptions for all "small, religiously mandated deviations from the standard military uniform" (Br. 35). "Small" deviations are, of course, only "small" in the eyes of the beholder. Moreover, even assuming the possibility of objective agreement on what constitutes a "small" deviation, size alone does not ensure that the exemption would have no disruptive impacts. Although the yarmulke itself is regarded by the Air Force as a disruptive deviation, one can imagine much "smaller" religiously-mandated deviations—for example, kum-kums (red dots worn on the forehead by Hindus) or the dreadlocks worn by Rastafarians (see page 44, *supra*).

If, by "small," petitioner is merely recasting his claim for a standard of "unobtrusiveness," his argument stands on no better footing. Any attempt to distinguish articles of religious dress on

denying exemptions to members of other religious groups, would raise substantial questions under the Establishment Clause. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982); see also *Cruz* v. *Beto*, 405 U.S. 319, 322 (1972) (per curiam) (prison officials may not limit chapel privileges to the members of "conventional" denominations). It may fairly be assumed that the Krishna monk's saffron robes are as important to him as is the yarmulke or an unshorn beard to an Orthodox Jew. Thus, there is no constitutional room to grant petitioner's request while denying others.

E. The Air Force Regulation At Issue Withstands Constitutional Scrutiny Even Under The Standard Of Review Applicable To Free Exercise Claims In The Civilian Sector.

Petitioner devotes a substantial portion of his brief (23-36) to an attack on the allegedly "pernicious" argument advanced by the government in *Heckler* v. *Roy*, cert. granted, No. 84-780 (June 17, 1985). We shall be filing a reply brief in *Roy*, and we will serve a copy of that brief on petitioner's counsel. In the meantime, we reiterate, as we explained at the outset (see pages 20-24, *supra*), that the "compelling governmental interest" and "least restrictive means" inquiries that petitioner urges upon the Court have no applicability in this military case. In these circumstances, it makes no difference whether those inquiries are approached from an individual or a program-

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the basis of their degree of "obtrusiveness" would inevitably and improperly favor established religions whose dress conventions are "commonly seen and accepted in today's [civilian] society" (Pet. Br. 11). If a yarmulke or a clerical collar is less "obtrusive" than a turban, it is not for any reason intrinsic to the apparel, but rather because the conventions of certain religions are simply better established in American society. In any event, as we have already demonstrated (see pages 31-33, *supra*), a yarmulke is itself "obtrusive" in the context of military society.

matic standpoint, and the legal analysis applicable to *Roy* need not be considered here.

For the sake of completeness, however, it should be made clear that the insistence of the Air Force on petitioner's compliance with A.F.R. 35-10 is constitutionally valid even under the mode of analysis he urges. First, it is scarcely open to debate that the military's interest in maintaining discipline, morale, esprit de corps, image, and teamwork, all for the purpose of ensuring that the nation is protected by a fighting force capable of achieving its military mission, is a governmental interest of the highest order. See *Bitterman* v. *Sec'y of Defense*, 553 F. Supp. 719, 724 (D.D.C. 1982), appeal pending, No. 83-1177 (D.C. Cir.). Second, it is obvious that no less restrictive alternative is available to accomplish that interest. Whether the government's interest is viewed programmatically or whether instead one analyzes the impact of granting an exemption to a particular individual, the result in this case is the same. Viewed from an individual perspective, even a single exemption would subject the government to the risk that a servicemember would not, without hesitation or question, be willing to follow his commander's orders in other circumstances. Adherence to orders, and hence discipline, is possible only when commanders are able to insist upon it, and expect that it will be followed, in all aspects of military life. When the national security is at stake, it is asking too much to assume that military personnel, in *their* discretion, will correctly decide what orders are essential to the security of the country and what orders are not. Even for one individual, therefore, an exemption from absolute norms is an unacceptably high price for the government to pay.

When viewed programmatically, it is equally obvious that the entire purpose of uniform standards would be defeated if individuals were allowed exemptions. To disregard the government's programmatic interests in this case in favor of exceptions made on a case-by-case basis

would make a mockery of the military's compelling interest in uniformity. This point is addressed most directly in *United States* v. *Lee*, 455 U.S. 252, 259-260 (1982). There, a member of a small religious group—the Old Order Amish—sought an exemption from the social security tax on employers on free exercise grounds. This Court recognized that such a claim could not be analyzed on the basis of the particular claimant, or his religious group, alone. Rather, the question was whether the government's interest could be upheld in the face of "myriad exceptions flowing from a wide variety of religious beliefs" (*id.* at 260). Similarly, the feasibility of an exemption from military dress and grooming requirements must be judged in light of the "myriad exceptions" to those requirements that would be sought. The district court made no attempt to show how its yarmulke exception would fit into the overall scheme of military dress and grooming. Clearly, it would not, and thus the government's programmatic interest in uniformity cannot be satisfied by any less restrictive means. See *Bitterman*, 553 F. Supp. at 726.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

KATHRYN A. OBERLY
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
Attorney

DECEMBER 1985

APPENDIX

FAITH TABERNACLE
United Pentecostal Church
1010 Burke Drive, P.O. Box 344
Junction City, Kansas 66441-0344
Phone 913-238-2988
LEONARD E. WESTBERG, Pastor
Phone 913-238-5598

September 28, 1984

Senator Aspin/Honorable Casper Weinberger:

According to the Army Time, August 21, 1984, you have directed The Department of Defense to conduct a study on religious policies that conflict with army regulations, and come up with a policy that is equitable and across the board.

I, Leonard Westberg, Pastor of Faith Tabernacle United Pentecostal Church, Junction City, Kansas do hereby regretfully submit to you the following facts.

I have pastored Faith Tabernacle in Junction City (adjacent to Fort Riley) for over thirteen years. I have had much conflict with the army over our religious convictions.

The list of young men and women that are listed below are just a few of the young men and women who have been chaptered out of the army because of religious convictions. These are the ones that chose to stay in Junction City after they were discharged, but there are many more who chose to go back home, so I have no record of them.

We are a strict fundamentalist group who love God, but we are intensely patriotic also, and feel an obligation to serve this great country as well as serving God. Our conflict with the army is usually in two areas. The first of which is the covering of the body. We believe that God

hates nakedness (Rev. 3:18, Gen. 3:21), and therefore it is very important to us to cover our bodies. In the list below, most of the young men were given a chapter five, or a chapter thirteen discharge because they asked not to roll their sleeves above their elbows. Bear this in mind, they were in uniform completely except they ask not to roll up their sleeves. They carefully explained to their superiors that it was a religious conviction, and respectfully requested to be allowed to leave their sleeves to the wrist. In most cases they were given a direct order to roll them up, given an article fifteen for disobeying a direct order, disciplined, and some of them were court martialed before they were discharged.

There has been a conflict, also, in that these young men asked not to be required to take off their fatigue shirts, or to wear shorts during physical training when there were females present.

The names marked with an asterisk below are young ladies who were given a chapter five, or a chapter thirteen discharge because they had asked permission to wear their uniforms that included a skirt, and ask to be allowed not to wear the fatigue trousers, because we do not believe in a lady wearing mens clothing.

It is impossible to describe the mental anguish and the humiliation these men and women have suffered because of a calloused disregard of their religious beliefs, and the harsh application of army discipline, and even harassment. In defense of the United States Army there have been a very few commanders who risked themselves being disciplined and took a chance on being denied advancement when they saw the sincereity and dedication to duty of these young men and women, and took advantage of Army Regulation 670-1, which give local commanders permission to establish uniform policies to their command.

These young men and women do not use drugs, alcohol, nor tobacco, and are holding down responsible jobs in the community. They are sincere, dedicated, hard working, and an asset to society. Their service to the United

States Army was invaluable, the cost of training them, and the interruption of their Army careers would have a staggering monetary loss if it could be evaluated.

I offer myself and all of these listed for further communication, either by letter, telephone or appointment.

It is with great confidence in your integrity, and with respect to your office that I submit these following fifty-one names.

Sincerely yours,

/s/ L. E. Westberg
L. E. WESTBERG

LEW:do

Enclosure: List of Names

[Enclosure omitted]

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No. 84-1097

IN THE

Supreme Court of the United States

October Term 1985

Supreme Court, U.S.
FILED
AUG 22 1985
JOSEPH F. ... JR.
CLERK

S. SIMCHA GOLDMAN,

Petitioner,

v.

THE SECRETARY OF DEFENSE, et. al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE RUTHERFORD INSTITUTE, THE RUTHERFORD INSTITUTE OF ALABAMA, THE RUTHERFORD INSTITUTE OF GEORGIA, THE RUTHERFORD INSTITUTE OF MINNESOTA, THE RUTHERFORD INSTITUTE OF MONTANA THE RUTHERFORD INSTITUTE OF TENNESSEE, THE RUTHERFORD INSTITUTE OF TEXAS, AND THE RUTHERFORD INSTITUTE OF VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE PETITIONER

F. Tayton Dencer
Counsel of Record
John W. Whitehead
D. Kevin Ikenberry
The Rutherford Institute
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0100

Thomas O. Kotouc
The Rutherford Institute
of Alabama
317 North Hull Street
Montgomery, Alabama 36104

Wendell R. Bird
William P. Hollberg
The Rutherford Institute
of Georgia
1750 Peachtree Rd., N.W.
Atlanta, Georgia 30309

Tony P. Trimble
The Rutherford Institute
of Minnesota
316 East Main
Anoka, Minnesota 55305

J. Douglas Alexander
The Rutherford Institute
of Montana
104 Second Avenue, S.W.
Sidney, Montana 59270

Les Bailey
The Rutherford Institute
of Tennessee
First American Center
12th Floor
Nashville, Tennessee 37328

W. Charles Bundren
The Rutherford Institute
of Texas
4300 Interfirst One
Dallas, Texas 75202

Guy O. Farley, Jr.
The Rutherford Institute
of Virginia
10521 Judicial Place
Fairfax, Virginia 22030

Attorneys for Amici Curiae

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IN THE

Supreme Court of the United States

October Term, 1985

No. 84-1097

S. SIMCHA GOLDMAN,

Petitioner,

v.

THE SECRETARY OF DEFENSE, et. al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE RUTHERFORD INSTITUTE, THE RUTHERFORD INSTITUTE OF ALABAMA, THE RUTHERFORD INSTITUTE OF GEORGIA, THE RUTHERFORD INSTITUTE OF MINNESOTA, THE RUTHERFORD INSTITUTE OF MONTANA THE RUTHERFORD INSTITUTE OF TENNESSEE, THE RUTHERFORD INSTITUTE OF TEXAS, AND THE RUTHERFORD INSTITUTE OF VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE PETITIONER

INTEREST OF AMICI CURIAE[1]

This case raises important issues concerning the scope of religious liberty in the military context. The military has

[1] Counsel of record to the parties in the case described above have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

sought to compel Petitioner to violate his conscience as to a requirement of his religion in order to preserve absolute uniformity in matters of dress. The Rutherford Institute believes that this action dangerously undervalues religious liberty.

Although the government's interest in instilling reflexive obedience in members of the military, and its derivative interest in uniformity as a means to that end, are concededly significant, there must be limits to what the military may require in the name of obedience and uniformity. The court below reasoned that the government's interest in enforcement (of uniformity) for its own sake is sufficient to overbalance substantial religious liberty interests. Under that reasoning, the government's authority would be theoretically limitless. The Rutherford Institute believes that the free exercise clause of the First Amendment poses limits to the government's authority even in the military context.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. With state chapters in Alabama, Georgia, Minnesota, Montana, Tennessee, Texas and Virginia and its national office in Manassas, Virginia, the Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to First Amendment religious freedoms. Counsel for *Amici Curiae* have specialized in constitutional litigation in state and federal courts, including litigation involving the Religion Clauses of the First Amendment, and have participated as counsel for *amici curiae* in previous cases before this Court. Counsel John W. Whitehead has argued and served as special constitutional consultant in numerous First Amendment cases and has authored several books and law review articles that focus on interpretation and application of the First Amendment Religion

Clauses. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

SUMMARY OF ARGUMENT

The government' argument for limited judicial review misconceives the rationale behind heightened judicial scrutiny. This Court's decisions establish that it is "the character of the right, not of the limitation, which determines what standard" of review should govern. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). The right to free exercise of religion is a fundamental right. Accordingly, government regulations abridging it must be closely scrutinized to determine whether they are the least restrictive means of accomplishing a compelling state interest. *Thomas v. Review Board*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

The deference due to the military because of its special competence in making military judgments does not require this Court to assume that the government's interest overbalances First Amendment interests or to forego analysis of whether the government has a less restrictive means at its disposal. It should not prevent this Court, therefore, from considering whether the government's interest in not granting Petitioner an exemption is compelling. Deference does not mean that military regulations abridging free exercise rights need not be justified, but only that the justifications proffered by the government be evaluated in light of the recognition that the courts have limited competence in making military judgments.

The government's argument that deference should take the form of lower scrutiny must, therefore, be construed to be an argument that its interest in all but the most extreme military regulations is so compelling that it can

never (or at least need not ever) tolerate any exemptions to accommodate religious freedom. It suggests a hypothetical balancing in which the government's interest in military governance is considered in light of the universe of First Amendment rights that might be burdened by its regulations, and the government's interest overbalances them all. This hypothetical balancing is inimical to the theory of balancing employed by this Court in free exercise cases which permits the government only a modicum of flexibility in restricting free exercise rights.

When a true balancing approach is applied, allowing for deference due to military judgments, it becomes apparent that the government's interest in not granting Petitioner an exemption is not even arguably legitimate, let alone compelling. The government's reasons for not granting Petitioner an exemption are merely reformulations of its general interest in uniformity. Analyzed at the margin, therefore, the government's interest in its regulation is not sufficient to overbalance Petitioner's religious liberty interest.

In evaluating the Petitioner's religious liberty interest, the court below exhibited the tendency of many lower courts to devalue religious liberty claims that relate to "conduct" rather than "belief." As this case illustrates, however, the belief/conduct distinction is misleading in that it relates imperfectly to what is evidently its purpose: To identify the core of freedom of conscience and to protect it absolutely. The compelled violation of religious faith at issue in this case trenches heavily upon freedom of conscience. This Court should refine the belief/conduct distinction to relate it more closely to freedom of conscience, or disavow it as constitutionally misleading.

ARGUMENT

I.

The Government's Suggestion That This Court Give Only Limited Judicial Review To Military Regulations Infringing Religious Liberty Dangerously Undervalues The Right To Free Exercise Of Religion, Unnecessarily Forecloses Meaningful Analysis Of The Government's Reasons For and Methods of Regulating Religious Liberty And Misplaces The Role Of Deference In Constitutional Analysis.

This Court's decisions require that government regulations abridging religious liberty receive strict scrutiny. Applying limited judicial review to instances of abridgment when they occur in the military context, as suggested by the government, not only lowers the standard by which the government's interest is assessed, but shifts the form of the analysis. In particular, it tends to preclude analysis of the government's interest at the margin. Deference to the military should not be construed to foreclose analysis; rather, it should lead this Court to evaluate specific claims made by the military that relate to matters of military expertise in light of this Court's limited competence in those areas.

A. THE GOVERNMENT'S ARGUMENT FOR LIMITED JUDICIAL REVIEW MISCONCEIVES THE RATIONALE FOR HEIGHTENED JUDICIAL SCRUTINY.

1. This Court's Decisions Establish That Government Regulations Abridging Religious Liberty Must Be Closely Scrutinized To Determine Whether They Are The Least Restrictive Means Of Accomplishing A Compelling State Interest.

The special role played by fundamental rights in our constitutional scheme has led this Court to subject govern-

ment action abridging such rights to close scrutiny. *e.g., Plyler v. Doe*, 457 U.S. 202, 216-217 n. 15 (1982); *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 98-99 (1972); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). It is now firmly established that only government regulations narrowly drawn, *e.g., San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 51 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960), to achieve a compelling state interest, *e.g., Roe v. Wade*, 410 U.S. 113, 155 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), can withstand such scrutiny.Nowhere is this more clear than in this Court's decisions with respect to the rights associated with the free exercise clause. *Thomas v. Review Board*, 450 U.S. 707, 718 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

The government's attempt to coerce petitioner to subordinate his religious convictions[2] to its dress code imposes a burden upon his religious liberty that is plainly within the compass of the free exercise clause. *Goldman v. Secretary of Defense*, 734 F.2d. 1531, 1537 (D.C. Cir. 1984). Under this Court's free exercise decisions, the government must justify its regulation by showing that "it is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Board*, 450 U.S. at 718. The government seeks to

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[2] Petitioner has at all times since childhood worn a yarmulke. *Goldman v. Secretary of Defense*, 734 F.2d 1531, 1532 (D.C. Cir. 1984). He has done so, not out of a regard for custom or as a matter of discretion in the adoption of personal or cultural habits, but out of a profound commitment to his religion, located within the tradition of Orthodox Judaism, which requires him to wear it. As the District Court found, there is thus "no doubt that [petitioner's] insistence on wearing a yarmulke is motivated by his religious convictions . . ." *Goldman v. Secretary of Defense*, 530 F.Supp. 12, 16 (D.D.C. 1981).

elide that burden by adverting to the special role of the military in our system of government and to institutional reasons for allowing the military to operate free from judicial review of all but the most arbitrary and unreasonable actions. The government thus points to its special interest in the military as a rationale for limited judicial review. This rationale misconceives the logic behind heightened judicial scrutiny.[3]

2. Strict Scrutiny Is Appropriate, Regardless of the Military Context, Because the Standard of Review Depends Upon the Character of the Right and Not Upon the Nature of the Government's Reasons for Imposing Limitations Upon Its Exercise.

The degree of judicial scrutiny that is appropriate - strict in the case of fundamental rights - arises out of the nature of the right asserted. *Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("It is the character of the right, not of the limitation, which determines what standard of choice governs."); *see. also., Plyler v. Doe*, 457 U.S. 202, 216-17 & n. 15 (1982). Indeed, the notion that the Constitution extends special protection to certain rights because they are fundamental to our system is simply another form of the proposition that the Constitution protects them from

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[3] As this Court has observed, "levels of 'scrutiny'. . . may all too readily become facile abstractions used to justify a result." *Rostker v. Goldberg*, 453 U.S. 57, 69-70 (1981). By predicating limited judicial review upon a theory of deference, the government deflects attention from, among other things, its lack of interest in not granting Petitioner an exemption and confuses the role of deference in constitutional analysis. It is nevertheless worthwhile to consider the flaws in the government's theory of judicial review because doing so exposes an analytically coherent way of reconciling the notion of deference to the military with First Amendment jurisprudence.

abridgement against all but special state interests. It follows from the special place of certain rights in our constitutional system that the government be required to show especially "good" reasons for any regulation that burdens their exercise. *See, e.g., Schneider v. Town of Irvington*, 308 U.S. 147, 164 (1939) (reasoning that certain types of interests, such as efficiency and convenience, are not enough to overbalance rights of free speech and press.)

Just how "good" a reason must be before it will justify abridgment of a right depends upon how important the right is.Thus, rights that are fundamental may be overbalanced only by a compelling state interest while certain other rights that find a less exalted, but still special, place in the constitutional hierarchy call for a substantial justification from the state. *Plyler v. Doe*, 457 U.S. at 230; *cf. H.L. v. Matheson*, 450 U.S. 398, 413 (1981) (finding statute justified by important state interests.) In short, the logic behind heightened judicial scrutiny is that the degree of justification called for varies directly with the importance of the right. *See San Antonio School District v. Rodriguez*, 411 U.S. at 99, 102-103 (Marshall, J., dissenting) (variations in levels of scrutiny depend upon the constitutional and social importance of right burdened.)

In light of this logic, the government's point that it has special institutional interests at stake in governing the military might be offered to this Court for analysis as a possible compelling justification for the government's abridgment of Petitioner's religious liberty, but it is not responsive to the rationale for heightened judicial scrutiny, unless it can be taken as a claim that the right to religious exercise is not a fundamental right in the military.[4] Perhaps because this notion is so deeply troubling and has so little, if

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[4] Apart from such a construction, the government's argument seems to fall somewhere between a *non sequitur* and a tautology. The *non sequitur*

any, claim to constitutional authority, the government does not advance it directly.[5] The origins of the view that the right to religious exercise is a fundamental right may be traced to the origins of the country itself, for many of those who settled the colonies came to America to escape religious persecution. *See Everson v. Board of Education*, 330 U.S. 1, 8-9 (1947). (reviewing history). The renascence of similar forms of persecution in early America "shocked the freedom-loving colonials into a feeling of abhorrence" and led to the 'conviction that individual religious liberty could be achieved best under a government stripped of all power to

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(footnote 4 continued)

is to argue special interests, which play the logical role of justifying limitations on a right, as a basis for treating the right as less important. The tautology appears when one recognizes that the government's argument against strict scrutiny is really an argument against the necessity of demonstrating a compelling interest and least restrictive means on a case-by-case basis. The government's argument then may be restated as follows: no compelling justification should be required to overbalance a burden on religious liberty because the government's interest in governing the military is compelling. As discussed below, this makes more sense if further refined to mean that no compelling justification should be required in *any particular case* because the government's interest in governing the military is, *in general*, so compelling that it overbalances all potential or hypothetical religious liberty interests. This hypothetical balancing is, however, inimical to the theory of balancing employed by this Court in its free exercise clause decisions.

[5] This Court's decisions upholding certain limitations on the exercise of constitutional rights have never intimated that the rights are somehow less important because they are sought to be exercised in the military. Rather, this Court has determined that limitations may be justified, notwithstanding the importance of the right, because of the special conditions of the military. *e.g., Brown v. Glines*, 444 U.S. 348, 354 (1980) ("The rights of military men [to free speech] must yield somewhat" to special demands required by military discipline); *Parker v. Levy*, 417 U.S. 733, 758 (1974)

interfere with the beliefs of a religious individual or group.' *Id.* at 11. The First Amendment, as an expression of this conviction, was not a fortuitous memorialization of a passing political philosophy, but a representation of a considered moral view - a moral view whose dimensions have deepened and broadened with the enriching experiences and thought of the past 200 years.

It is too late now for the government to argue that freedom of religious exercise is not a fundamental right. It is fundamental, not only in the sense of its being a legal entitlement to which, by reason of the First Amendment, an individual's claim is particularly clear, but also in the sense that such a basic right is a constitutive element of a free and enlightened society, an aspect of the individual dignity and freedom which form the premise of a free society. Because the right to religious exercise inheres in the individual, it can be no less fundamental to a member of the military than to a civilian. Put another way, the fact that free exercise rights are abridged in the military rather than in the civilian context should not affect the seriousness with which we view that

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(footnote 5 continued)

(members of military not excluded from protection of First Amendment but different character of military community requires different application); *see generally*, Zillman and Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on The Society Apart*, 51 *Notre Dame Lawyer* 396 (1976); Wulf, *Commentary: A Soldier's First Amendment Rights: The Art of Formally Granting and Practically Suppressing*, 18 Wayne L. Rev. 665 (1972). Though the practical consequence may in some cases be the same, it is important to recognize, because it leads to different doctrinal conclusions, that this Court's decisions upholding limitations on First Amendment rights in the military have relied on a theory for limiting fundamental rights and not upon the idea that such rights were not important or fundamental.

abridgment.[6] This is not to say that the special conditions of the military do not justify limitations on the exercise of religious freedom which would not withstand scrutiny if imposed in a civilian context. But the significance of the right, as a constitutional value, does not vary with the context.

As a matter of principle, a limitation on the exercise of a right could be upheld either because the right was not sufficiently important, or because, notwithstanding the importance of the right, the government's special interest in the limitation, as applied to restrict the exercise of the right, justified the limitation. The point of the above argument is that a limitation on the right of religious exercise could not be upheld on the theory that the right was not sufficiently important. The second possibility - that a special governmental interest might justify a limitation on the exercise of a right - is what strict scrutiny is all about.

This Court has recognized that, in the case of a fundamental right such as religious exercise, "[o]nly the gravest abuses, endangering paramount interests, give occasion for

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[6] The context may, of course, enter into the determination of whether certain rights exist in the first place. This Court has recognized for example, that free speech rights do not extend to non-public forums. *Perry Education Ass'n. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983); *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129 (1981). The standard of review given to free speech claims in such cases is accordingly lower, and less than compelling reasons will justify restrictions on speech. The non-public forum cases do not deal with the legal justification necessary to sustain a withdrawal of (or limitation on) free speech rights, but rather with the very different question of whether it could be said, given the context, that those rights existed in the first place. *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (holding that petitioner had no constitutional right to protest on jail grounds); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (holding civilians had no constitutional right to distribute leaflets on military property).

permissible limitation." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) *quoting Thomas v. Collins*, 323 U.S. 516, 530 (1945). As elucidated by this Court, this means not only that the government must show that it has a compelling interest but also that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Thomas v. Review Board*, 450 U.S. at 707, 718; *Sherbert v. Verner*, 374 U.S. at 407.

(footnote 6 continued)

Some of these cases also raise the corollary inquiry whether government by its actions has opened a forum and thus obligated itself to extend free speech rights where none previously existed. *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). If, however, the government opens what is otherwise not a public forum and thereby creates a sphere in which free speech rights exist, its regulation of speech in that "limited public forum" is subject to the same exacting scrutiny applicable to government regulation of speech in a public forum. *Id.* at 267-70. The principle deducible from these cases is that once a right to free speech exists, either because the right inheres in the forum or because government has created the right by opening a forum, it cannot be abridged apart from a compelling justification. For this reason, the elimination of a forum in which free speech rights inhere would require a compelling state interest. *Perry Education Ass'n v. Perry Local Educators' Assn.*, 460 U.S. 37, 56, 66 (1983) (Brennan, J., dissenting). Whether a given forum involves a truly non-public forum or the elimination of a forum as to which legitimate claims to speech rights may be made may be a difficult question.

It is, happily, not the kind of question presented by this case, for it is at least clear that the protections of the free exercise clause extend to members of the military as well as to civilians. The question in the military context is not the existence of a right, but the extent to which limitations on the exercise of that right may be justified. The appropriate framework for resolving that question is the strict scrutiny called for by this Court's decisions under the free exercise clause.

B. THE GOVERNMENT'S ARGUMENT FOR LIMITED JUDICIAL REVIEW ELIDES THE LEAST RESTRICTIVE MEANS AND COMPELLING INTEREST STRANDS OF ANALYSIS REQUIRED AS PART OF THE STRICT SCRUTINY THIS COURT GIVES TO GOVERNMENT REGULATIONS ABRIDGING FUNDAMENTAL RIGHTS AND SUBSTITUTES IN THEIR STEAD A HYPOTHETICAL BALANCING INIMICAL TO THE THEORY OF BALANCING EMPLOYED BY THIS COURT.

The government's argument that deference should take the form of lower scrutiny must, therefore, be construed to be an argument that its interest in all but its most arbitary regulations is always compelling. As such, it would replace the case-by-case balancing called for by this Court's free exercise decisions with a hypothetical balancing in which the government's interest was considered in light of the universe of First Amendment rights that might be burdened by the government's regulations. Lower scrutiny is, in this sense, a rule representing the outcome of the government's hypothetical balancing: The government's interest in all but its most arbitrary regulations overbalances all potential First Amendment interests.

Such a hypothetical balancing is, however, plainly inconsistent with this Court's approach to fundamental rights. That approach seeks to confine balancing to those unusual cases involving the "gravest abuses, endangering paramount interests," *Thomas v. Collins*, 323 U.S. at 530, and thereby to permit the government only a modicum of flexibility in restricting such rights.[7] The government's hypothetical

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[7] *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975) (discussing limited role of balancing in First Amendment analysis).

balancing has the opposite effect, creating a rule that reflects the balancing away of rights in all but the most extreme cases. *Id.* at 531 ("Where the line shall be placed in a particular application rests, not on . . . generalities, but on the concrete clash of particular interests and the community's relative evaluation both of them and of how the one will be affected by a specific restriction . . .").

A more subtle effect of the government's wooden approach is to prevent consideration of whether the government's interest in not accommodating an individual by granting him an exemption was compelling. It would also foreclose analysis of the related question whether the government's regulation was the least restrictive means of accomplishing its interests. Yet in any case in which a truly significant governmental interest is set in conflict with a First Amendment right, these two related inquiries will always be more critical to pursue than the more general question whether the state's interest may be ranked with those "in the highest order." *See Wisconsin v. Yoder*, 406 U.S. at 215-16, 221-25.

An exemption, like a less restrictive means, has the potential for resolving both the government's and the individual's claims without compromising either. There may, of course, be a significant marginal cost to the government of granting an exemption or shifting to a less restrictive means. But that marginal cost will generally be less than the cost to the government of not accomplishing its interests. Analyzing the government's interest at the margin therefore minimizes, and to that extent eliminates, the putative conflict between the government and individual. Because such marginal analysis obviates, *pro tanto*, a final ranking of the government's interest (as compelling or not compelling), and the balancing that implies, such a ranking should always be subordinated to the evaluation of any potential exemption or less restrictive means.[8] *See United*

States v. Robel, 389 U.S. 258, 268 n.20 (1967) (avoiding determination of whether government's interest outweighed individual's First Amendment interest by focusing on availability of less drastic means.) The government's hypothetical balancing, therefore, forecloses pursuit of the most relevant inquiries.[9]

The government's argument for lower scrutiny thus amounts to a sweeping claim that its interest in military governance is so compelling that it could never tolerate any exemptions to accommodate religious freedom. "Where fundamental claims of religious freedom are at stake, however," this Court "cannot accept such a sweeping claim; despite its admitted validity in the generality of cases," this Court "must searchingly examine the interests that the state seeks to promote by its requirement . . . and the impediment to those obectives that would flow from recognizing [an] exemption." *Wisconsin v. Yoder,* 406 U.S. at 221. In short, the government's general proposition - that its interest is always compelling - cannot support the weight of the analysis its seeks to replace.

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[8]If the government is unwilling to shift to a less restrictive means or to grant an exemption, even though such adjustments would not prevent it from accomplishing its stated interest, it must be because the government's real interest is not in the ends allegedly sought to be attained but in the means itself. Indeed, the court below recognized that the government's interest in this case is in enforcement for its own sake and not in the particular requirements of the regulations. *Goldman v. Secretary of Defense*, 734 F.2d at 1534 ("That interest lies in the enforcement of regulations, not for the sake of the regulations themselves, but for the sake of enforcement.") But the claim that the government's interest is in enforcement for its own sake crudely resolves itself into a claim that the government's interest is in doing whatever it decides to do.

[9]*See* Tribe, *American Constitutional Law*, 855 (1978) ("In applying the least restrictive means alternative-compelling interest requirement, it is crucial to avoid the error of equating the state's interest in denying a

C. THE GOVERNMENT'S ARGUMENT FOR LIMITED JUDICIAL REVIEW MISPLACES THE ROLE OF DEFERENCE IN CONSTITUTIONAL ANALYSIS.

The government attempts to deflect analysis of its argument for limited judicial review by framing it in terms of the notion of deference. This Court's decisions make clear, however, that deference does not require this Court to assume that the government's interest overbalances the First Amendment interests or to forego analysis of whether the government has a less restrictive means at its disposal. In *United States v. Robel*, 389 U.S. 258 (1967), for example, this Court struck down a statute prohibiting employment of a member of a communist-action organization at a "defense facility" on the ground that there were other less drastic means available to Congress in achieving its goal of preserving the national defense. *Id.* at 265-68. Deference does not obviate scrutiny of means; on the contrary, "'[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' " *Id.* at 265 *quoting NAACP v. Button*, 372 U.S. 415, 438 (1963).

The deference required by the constitutional role of the military should affect the weight to be given to the particular interests asserted by the government in justification of its regulation. *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) (deference affects acceptance of specific judgments). It should not affect either the standard by which those claims are assessed or the requirement that the government's means be narrowly tailored to its goals. An assertion by the

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(footnote 9 continued)

religious exemption with the State's usually much greater interest in maintaining the underlying rule or program for unexceptional cases. Only the first interest - that in denying an exemption - is constitutionally relevant when an exemption is sought.")

military that an interest was compelling might be accepted out of deference, for example, to the military's special competence in certain areas, even though a similar assertion in the civilian context would not. *Id.* (deference due to Congressional judgments regarding military operations and needs).

Nevertheless, deference does not require that even wholly implausible claims be accepted. *Frontiero v. Richardson*, 411 U.S. 677, 689-90 (1973). This Court has the obligation to review the government's claims to determine which may, and which may not, properly be called compelling taking into account the deference due to military judgments. Deference thus does not mean that military regulations abridging free exercise rights need not be justified, but only that the justifications proffered must be evaluated in light of the recognition that the courts have limited competence in making military judgments. [10]

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[10] Because deference to the military is seen as resting at least in part on the military's claim to special competence in certain areas, the degree of deference that is appropriate may vary depending upon the type of claim the military is asserting and upon the conditions under which it is being asserted. *Compare Frontier v. Richardson*, 411 U.S. 677 (1973) (overturning sex-based distinction in quarters allowances and medical benefits available to members of military) *with Schlesinger v. Ballard*, 419 U.S. 498 (1975) (sustaining distinction between men and women based on participation in combat by men) *and Rostker v. Goldberg*, 453 U.S. 57 (1981) (sustaining sex-based distinction in draft registration requirement). *See also* Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 191-94 (1962). For example, a military judgment that troops be deployed on a certain day in a time of war would seem almost certainly to command greater deference than that due a general claim to expertise in military governance in a time of peace. Given the large percentage of society under military authority, the peace-time claims of the military to special competence in matters affecting fundamental rights should be viewed more narrowly. *Id.* at 187-88.

II.

The Military's Interest In Not Granting Petitioner An Exemption Is Not Compelling Even Taking Into Account the Deference Due to Specific Claims Made By the Military.

Deference to the military requires recognition that its interest in uniformity is substantial. It is unnecessary to consider, however, whether this interest could be ranked as "compelling," for the government must in any event show that exempting Petitioner would prevent it from realizing its interest in uniformity. Put another way, the government must show that its interest in preventing the marginal loss of uniformity represented by granting petitioner an exemption is compelling. *Wisconsin v. Yoder,* 406 U.S. at 221-25, (analyzing whether marginally better fulfillment of state's interests in education achieved by not granting exemption to Amish children from state's requirement of one or two years of additional school outweighed the religious exercise rights of the Amish). The government cites its own study for the proposition that "strict compliance with uniformity regulations" will "[break] down the barrier to discipline." *Goldman v. Secretary of Defense,* 734 F.2d at 1538-39. This is, however, no more than a restatement of the government's interest in uniformity in general.

The government must show, rather, why granting Petitioner an exemption would undermine the government's interest in uniformity in any significant way. It is in fact difficult to see how exempting Petitioner would have that effect. Indeed, it would be hard to reconcile such an assertion with the fact that Petitioner wore the yarmulke for several years prior to the event that precipitated this litigation. If the government's interest in not permitting such an exception is compelling, why was the government so dilatory in challenging Petitioner's *de facto* claim of exemption?

A distinction might be drawn between a *de facto* exemption, which arguably does not entail a formal challenge to military power, and an explicit exemption, which would require a public concession to a challenge to the uniformity policy. It thus might be argued that the government's critical interest is in assuring that the will of the military once asserted is obeyed. The danger of allowing an exemption would, in this view, flow not from the breach in uniformity *per se,* but from the breach of asserted authority. The trouble with this argument is that it proves both two much and too little.

On the one hand, it would undermine the basis for any effective judicial review of military decisions, because only when military authority were challenged would the problem of granting an exemption prove critical. In such case, protection would always be unavailable when needed. On the other hand, it would presumably mean that the military could establish a system for accommodating religious needs, because claims for exemption would then not represent challenges to military authority but acts of submission to it. This latter problem not only exposes the difficulty with this line of argument but also points toward the central problem with the military's justification for refusing an exemption: It is ultimately predicated on the view that the military can demand that the individual subordinate his will to its expressed will in every case.

That justification would leave no room for freedom of conscience. Indeed, freedom of conscience would be available only to the extent that military regulations allowed for it. To the extent that such regulations cut into freedom of conscience, the argument that the regulations abridged freedom of conscience in a wholly arbitrary manner would never be helpful, for the government could always respond that its interest was in the "enforcement of the regulations, not for the sake of the regulations themselves, but for the sake of enforcement." *Goldman v. Secretary of Defense,*

734 F.2d at 1540. There does not appear, therefore, to be any arguably legitimate, let alone compelling, reason for the government to refuse to grant Petitioner an exemption.

Perhaps for this reason, the government argues instead that it must consider "not the effect of a single exception but the cumulative effect of numerous exceptions that might be requested . . ." *Goldman v. Secretary of Defense,* 734 F.2d at 1539. But, as this Court has observed, "undifferentiated fear or apprehension of disturbance is not enough to overcome" fundamental rights. *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 508 (1969). The government's *de facto* grant of an exemption to Petitioner throughout the past several years has not led to such a problem and there is no reason to assume that granting him an explicit exemption will have that effect now. Nor is there any evidence in the record to suggest that it would. The likelihood that granting Petitioner an exemption would lead to numerous requests is not a problem peculiarly within the military's expertise.[11] Finally, the argument that one exemption will lead to numerous others, which will in turn destroy the system, is available in every free exercise case. But it is more a critique of the requirement of an exemption than it is an explanation of why one cannot be granted. This Court has rejected such arguments in the past and should do so now.

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[11]The possibility that granting an exemption, or several exemptions, would tend to vitiate the reflexive obedience which the government is seeking to *instill* is a military matter, if only because the military's judgment is based upon its experience in developing such obedience. For the reasons discussed above, however, this fear is simply not credible enough, even considering the deference due to the military, to overbalance Petitioner's religious freedom.

III.

The Government's Effort to Compel Petitioner to Violate His Religious Faith Strikes At the Core of Freedom of Religious Conscience And the Religious Liberty Interest Thereby Implicated Should Not Be Devalued Merely Because It Involves "Conduct" Rather Than "Belief."

The government's asserted interest for refusing to grant Petitioner an exemption would clearly have no merit in a civilian context. Even considering the deference due to the military, the military's asserted interest for refusing to grant an exemption is simply not compelling.[12] Yet to the extent that the military's interest is viewed as significant, the analysis inevitably leads to evaluation of the weight to be given to Petitioner's religious freedom claim. Once a case is put in this pure balancing posture, there is a need to break the deadlock by somehow ranking the individual's interest as more or less compelling than the government's interest.

The apparent alternative is to treat all religious claims that are able to pass an initial threshold, having to do with whether they fall within the scope of the free exercise clause, as undifferentiable. Analytic consideration would then be limited to whether the government's interest is compelling in

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[12]This may be why the government has sedulously sought to avoid the issue first by arguing that only limited judicial review (which would not require it to adduce a compelling interest for refusing exemption) is appropriate, and second by arguing that the problem is not a single exemption but the numerous requests which such an exemption might generate. The government thus seeks to erect a standard of review premised on its claim to unique competence as a general matter to shield its inability to defend that claim as applied to a specific case.

some absolute sense. But it is difficult to assess whether a particular interest is compelling without reference to the interest required to be subordinated. Moreover, attempting to evaluate such claims in the abstract may merely obscure an intuitive weighing process that is unavoidable.

The powerful urge to evaluate the substantiality of religious exercise claims appears in this Court's references to the distinction between conduct, which is regulable, and belief, which is not. The court below concluded that Petitioner's religious exercise involved conduct rather than belief. Although that court found that Petitioner's interest, thus characterized, raised "serious questions," the distinction between belief and conduct made it easier for the court to conclude that the "Air Force's reason [sic] for its rules . . . are sufficient answer." Employed in this manner, the belief/conduct dichotomy is gravely misleading because it relates awkwardly to what is evidently its noble purpose: To identify the core of freedom of conscience and to protect it absolutely.[13]

As this case illustrates, labelling a thing as "conduct" rather than "belief"[14]; does not establish that it is any more

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[13]The implicit trade-off in protecting core freedoms absolutely is to permit at least some regulation and restriction of penumbral freedoms. In the lower federal courts, the distinction appears frequently to be employed to devalue religious freedom claims. *See e.g., Grosz v. City of Miami Beach,* 721 F.2d 729 (11th Cir. 1983); *Badoni v. Hagginson,* 638 F.2d 172 (10th Cir. 1980).

[14]There is, of course, the ontological problem of giving content to the distinction between belief and conduct. But the lower courts do not appear to have been troubled by such problems and have frequently found it convenient to label things as "conduct." *See e.g., Keller v. Gardner Community Consolidated Grade School District,* 552 F.Supp. 512, 514-515 (N.D. Ill. 1984) and, *United States v. Warner,* 595 F.Supp. 595, 597 (D.N.D. 1984). Because the purpose of the distinction is to

distanced from the core of freedom of conscience. The wearing of the yarmulke is, for Petitioner, no less a matter of conscience than stating his belief in God would be if required as a test for public office.[15] Both are absolutely required by his religion and one is not, as a matter of conscience, any "less required" than the other. To put it conversely, to coerce Petitioner into wearing Air Force headgear in lieu of his yarmulke would work, it is fair to say, as much torture on his conscience as would coercing him to deny some religious belief. For him, wearing the yarmulke is a matter of obedience to his religion, one that he has faithfully and fastidiously executed throughout his adult life. To coerce him into forsaking it now would cause him to violate his conscience on a fundamental level.

If the object of the distinction is to locate in the nature of the religious interest for which protection is sought some characteristic that will facilitate a qualititative comparision of the government's interest to the individual's, it is therefore not helpful to refer to the distinction between

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(footnote 14 continued)

enable a comparison of a substantial government interest with a religious interest with a view toward determining a clear-cut victor, the distinction may be central to the outcome of many cases. Indeed, it seems to offer a readily identifiable and principled resolution of what otherwise appears to be, at least in a close case, a problematic weighing process. If the distinction is in actuality an awkward abstraction of the notion that there are certain core aspects of freedom of conscience, its potential to mislead constitutional analysis is great.

[15] *See Torcaso v. Watkins,* 367 U.S. 488 (1961) (holding religious test for public office to be invalid under free exercise clause as infringement of belief); *McDaniel v. Paty,* 435 U.S. 618, 627 (1978) (construing restriction on religious freedom in *Torcaso* to be restriction on belief rather than conduct).

belief and conduct. The distinction between belief and conduct offers a convenient bright line, one that enables a dichotomous qualititative evaluation of religious exercise claims useful for purposes of ranking such claims as against substantial government interests. But the line thus drawn does not mark a division between claims relating to the core of religious conscience and those outside that core.

Whatever may be the precise boundaries of such a core, the compelled violation of religious faith at issue in this case surely must be within them. Consideration of whether government action compels a violation of religious faith is "the beginning, not the end, of [the] inquiry." *Sherbert v. Verner,* 374 U.S. at 403-04. Government action that compels a violation of an individual's religious faith imposes a direct burden on religion, as opposed to indirect burden occasioned by regulations that coerce (but do not compel) violation of religious faith through denial of a benefit.

This would be a different case if the government sought to prevent Petitioner from attaining promotions because of his insistence on wearing the yarmulke. Although that restriction would also violate the free exercise clause by imposing an unconstitutional condition upon the exercise of Petitioner's religious liberty, it would at least afford him freedom to choose to suffer the penalty. By contrast, the government here would afford him no choice. The religious liberty interest which Petitioner asks this Court to protect is, in this sense, a core freedom. If one were seeking a dichotomous evaluation of the religious interest in this case, Petitioner's religious liberty interest should, therefore, emerge from the analysis with a higher rather than a lower ranking.

The belief/conduct distinction contains within itself the potential to mislead constitutional analysis, as its use by lower courts would appear to demonstrate. This Court should refine the distinction to relate it more directly to freedom of conscience, or should disavow it entirely and

replace it with a direct inquiry into the effect of regulations on freedom of conscience. Regulation of belief should be unconstitutional regardless of how the test is framed.

The government's regulation would force Petitioner to violate his conscience as to a fundamental requirement of his religion. Such compelled violation of conscience is repugnant to the Constitution. The government has not adduced any compelling reasons for not granting Petitioner an exemption from its requirement. This Court should, therefore, require the government to grant him an exemption.

CONCLUSION

This Court should always require the government to identify compelling reasons for regulations abridging religious liberty. Religious liberty is a fundamental value, for members of the military as well as civilians. The special constitutional role of the military does suggest that in evaluating specific claims made by the government on military matters, this Court should be slow to substitute its judgment for the government's. It simply does not follow from this, however, that the government need not advance any compelling reasons for action abridging religious liberty. Nor does it follow that purely frivolous claims, or claims that are not significantly related to the military's special expertise, should automatically be considered compelling. This Court must carefully consider the government's claims, taking into account its lack of expertise in certain military matters, to determine first whether such claims merit deference, and second whether given such deference, they evince a compelling interest.

Analysis becomes, if anything, more important whenever it is necessary for this Court to defer to the government as to the legitimacy of certain judgments, for in such cases the

Court has less of an independent basis for assessing whether or not religious liberty is being unnecessarily burdened. The necessity of relying to some extent on the government's substantive judgment should make this Court more scrupulous in testing the government's rationale against the formal requirements of free exercise doctrine. In particular, this Court must require the government at least to assert a compelling reason for its regulation. Such analysis of the government's interest at the margin is firmly established as a strand of strict scrutiny analysis. *E.g., Wisconsin v. Yoder,* 406 U.S. at 215-16; *Shelton v. Tucker,* 364 U.S. at 488. The government's uniformity argument is seriously deficient, for reasons having little to do with military expertise, as an explanation for not granting Petitioner an exemption. It means, as the court below recognized, that the government's interest is actually in "enforcement for its own sake," *Goldman v. Secretary of Defense,* 734 F.2d 1531, 1537 (D.C. Cir. 1984). It thus resolves itself into the meaningless claim that the government's interest is in doing whatever it decides to do.

Petitioner has a fundamental right to the free exercise of his religion. This right should not be devalued merely because its expression involves conduct. This Court must, therefore, reject the specious reasons advanced by the government for restricting Petitioner's religious liberty and order the government to grant Petitioner an exemption.

The decision of the court below conflicts with the free exercise clause of the First Amendment. It is, therefore, essential that the conflict be resolved in favor of Petitioner.

Respectfully Submitted,

F. Tayton Dencer
Counsel of Record
John W. Whitehead
D. Kevin Ikenberry

The Rutherford Institute
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0100

Thomas O. Kotouc
The Rutherford Institute
of Alabama
317 North Hull Street
Montgomery, Alabama 36104

Wendell R. Bird
William P. Hollberg
The Rutherford Institute
of Georgia
1750 Peachtree Rd., N.W.
Atlanta, Georgia 30309

Tony Trimble
The Rutherford Institute
of Minnesota
316 East Main
Anoka, Minnesota 55305

J. Douglas Alexander
The Rutherford Institute
of Montana
104 Second Avenue, S.W.
Sidney, Montana 59270

Les Bailey
The Rutherford Institute
of Tennessee
First American Center
12th Floor
Nashville, Tennessee 37238

W. Charles Bundren
The Rutherford Institute
of Texas
4300 Interfirst One
Dallas, Texas 75202

Guy O. Farley, Jr.
The Rutherford Institute
of Virginia
10521 Judicial Place
Fairfax, Virginia 22030

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Supreme Court of the United States

OCTOBER TERM, 1985

S. SIMCHA GOLDMAN,

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v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF PETITIONER

STEVEN FREDERICK MCDOWELL
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

Counsel of Record for
Amicus Curiae

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INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League) is a non-profit voluntary association, national in membership, organized to promote good will and harmonious relations in the community, to combat all forms of religious prejudice and discrimination and to defend the right to life of all, born and pre-born. To fulfill these purposes the League frequently files amicus curiae briefs in cases, such as this one, involving the free exercise of religion. The League's objective is to further each person's right to freely exercise their religious beliefs.

The League has obtained written permission to file this brief from the counsels of record for the parties in this case. These letters have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

A member of the Armed Forces, who has followed the commands of his religion, has been ordered to discontinue the religious practice of wearing a yarmulke or face several adverse consequences. This religious practice has been sincerely followed since childhood, including several years of military service. The military claims its interest in enforcement of regulations "for the sake of enforcement" is of more importance than the free exercise of religion and constitutes a compelling state interest justifying an imposition on this free religious exercise. However, the interest expressed by the military does not reach the compelling standard necessary to justify a burden placed upon any person's religion, even that of a member of the Armed Services.

ARGUMENT

I.

THE JUDICIARY CAN AND SHOULD ENFORCE THE RIGHT TO FREE EXERCISE OF RELIGION IN THE MILITARY.

This Court has given "great deference" to the decisions of Congress concerning the military, noting the general lack of judicial competency on this topic. *Rostker v. Goldberg,* 453 U.S. 57, 64-65 (1981). Congress, however, cannot disregard the Constitution simply because it acts under the title of military affairs. *Id.* at 67. Congressional acts in this realm remain subject to constitutional review, although tests and limitations may be applied in a different manner. *Id.* First Amendment protections, including the right to free exercise of religion, are still guaranteed to the members of the military, *Parker v. Levy,* 417 U.S. 733, 758 (1974), who may enforce their constitutional rights through the civilian court system. *Chappell v. Wallace,* 462 U.S. 296, 304 (1983).

The right to the free exercise of religion has been "zealously protected" by this Court, at times at the expense of other interests of high social importance. *Wisconsin v. Yoder,* 406 U.S. 205, 214 (1972). This Court has also observed that this

right has been accommodated in a military setting. Government facilities are utilized by military personnel for practicing their faiths, *School District v. Schempp,* 374 U.S. 203, 226 n.10 (1963), and chaplains are provided for the spiritual benefit of those in uniform by all branches of the Armed Services. *Id.* at 296, (Brennan, J., concurring).

II.

DESPITE THE UNITED STATES AIR FORCE REGULATIONS, A PERSON'S FIRST AMENDMENT RIGHT TO FREELY EXERCISE ONE'S RELIGION MUST BE ACCOMMODATED.

The constitutional protection accorded to free exercise of religion means that no state action can burden one's religious liberty unless it is shown that it is the least restrictive means of achieving a compelling state interest. *Thomas v. Review Board,* 450 U.S. 707, 718 (1981); *Sherbert v. Verner,* 374 U.S. 398, 403 (1963). As this Court observed in *Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972): "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Therefore, only in a very rare instance will a religious practice be forbidden entirely. This legal framework is a necessary expression of the value the Constitution places on protecting religious freedom from arbitrary governmental interference and should be followed in this case.

When a governmental action places a person in the precarious position of choosing between fidelity to one's sincerely held religious beliefs and one's employment there is a substantial burden upon religion. *Thomas,* 450 U.S. at 717-18. This type of burden is found in this case. There is no doubt as to the sincerity of Goldman's religious convictions. *Goldman v. Secretary of Defense,* 734 F.2d 1531, 1537 (D.C. Cir. 1984). Those religious beliefs require that he keep his head covered at all times. He has faithfully followed these beliefs since childhood by wearing a yarmulke. *Goldman,* 734 F.2d at 1532. This practice continued, without incident, dur-

ing several years of military service. *Goldman v. Secretary of Defense,* 739 F.2d 657, 658 (D.C. Cir. 1984) (Starr, Circuit Judge, dissenting.) Clearly, Goldman's religious liberty was burdened when he was reprimanded, warned of subjection to court-martial and received a negative recommendation for continued active service as the result of his religiously motivated decision to wear a yarmulke.

While there is a valid governmental interest in maintaining discipline in the armed services, it is not sufficiently compelling to justify the burden on free exercise of religion imposed in this case. There does not appear to have been a showing that permission for Goldman to wear a yarmulke would cause either serious disruption of discipline or a barrage of requests for exceptions to the Air Force regulations. The court of appeals, thus, seems to have rested its finding of a compelling governmental interest solely on the importance of enforcement of the regulations "for the sake of enforcement." *Goldman,* 734 F.2d at 1541. The court accepted the Air Force's rationale that any exception from its arbitrary rules to accommodate religious scruples would incur resentment from others and would interfere with the reflexive obedience necessary for the Air Force's function. *Id.*

The primary difficulty with the appellate court's position, however, is its unwillingness to make any real examination of the validity of this rationale. When free exercise of religion is burdened there should be at least some serious objective study of the validity of the rationale. Total deference to military judgment, in effect, destroys any protection of religious practice in the military. Although the appellate court was very probably correct in according lesser deference to a decision delegated to the military than to a congressional decision relating to the military, amicus submits that the appellate court failed to properly apply this standard of lesser deference. The result was that the appellate court did not appropriately carry out its judicial duty not to "abdicate [its] responsibility to review the constitutional challenge." *Goldman,* 734 F.2d at 1539. The absence of serious application of the appellate court's own standard of review is best

illustrated by Judge Starr's vehement dissent to the court's order denying rehearing, which challenged the Air Force's rationale on the basis of common sense as well as Goldman's proffered expert testimony. Judge Starr noted that: "[r]easonable servicemen would more justly be annoyed with the mechanical enforcement of arbitrary rules that prevent the wearing of such unobtrusive symbols of religious faith while allowing others to wear religious rings and bracelets." *Goldman,* 739 F.2d at 659. Given the fact that some accommodation of religious practice is permitted, there is not the need for an "exceptionless" system which justified the imposition on free exercise of religion in *United States v. Lee,* 455 U.S. 252, 259-260 (1982). If rules can accommodate religion, it would seem that the military could as effectively enforce a rule not burdening religion as it could the present arbitrary rule. Thus, when the government's interest is properly evaluated, there does not appear to exist a governmental interest sufficiently compelling to outweigh Goldman's right to free exercise of religion.[1]

CONCLUSION

Because the Air Force's practice denying Goldman the right to wear a yarmulke burdens Goldman's religious practice and is not the least restrictive alternative to accomplish

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[1] The other lower court cases on the permissibility of restrictions on the wearing of yarmulkes do not suitably resolve this issue. Both *Menora v. Illinois High School Association,* 683 F.2d 1030, 1033-34 (7th Cir. 1982) and *Bitterman v. Secretary of Defense,* 553 F. Supp. 719, 725 (D.D.C. 1982) involve situations in which the respective courts improperly made independent interpretations of Jewish religious practice rather than appropriately focusing upon the interpretation of the individual whose religious practices were burdened. These decisions conflict with the policy underlying this Court's pronouncement in *Thomas,* 450 U.S. at 716, that "it is not within the judicial function or judicial competence to inquire whether [one member of a faith] more correctly perceived the commands of their common faith [than another member]."

a compelling governmental interest, the judgment of the court of appeals should be reversed.

Respectfully submitted,

STEVEN FREDERICK MCDOWELL
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

Counsel of Record for
Amicus Curiae

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS *AMICUS CURIAE*

DANIEL P. LEVITT
KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL
919 Third Avenue
New York, New York 10022
(212) 715-9100

Of Counsel:

SIGMUND S. WISSNER-GROSS
ABBE L. DIENSTAG
KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL
919 Third Avenue
New York, New York 10022

JUSTIN J. FINGER
JEFFREY P. SINENSKY
JILL L. KAHN
Anti-Defamation League of B'nai B'rith
823 United Nations Plaza
New York, New York 10017

Attorneys for Amicus Curiae

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Air Force Regulation 35-10 ..... *passim*

Air Force Regulation 35-15(3)(a)(1) 11

Defense Authorization Act, 1985, Pub. L. No. 98-525, § 554, 98 Stat. 2532 (1984) 5

R. Hirsch, *Hirsch Siddur* (1969) 3

Joint Service Study on Religious Matters, Religious Practice Study (1985) 5, 6, 10, 15, 16

Maimonides, *The Guide to the Perplexed* (M. Friedlander ed. 1881) 3

Talmud, Tractates Kiddushim and Shabbath (The Traditional Press, 1979) 3

IN THE

Supreme Court of the United States

October Term, 1985

No. 84-1097

S. SIMCHA GOLDMAN,

Petitioner,

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, *et. al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS *AMICUS CURIAE*

The Anti-Defamation League of B'nai B'rith submits this brief in support of the petitioner and respectfully submits that the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed.

INTEREST OF THE AMICUS CURIAE

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League ("ADL") was organized in 1913 as a section of the B'nai B'rith to advance good will and mutual understanding among Americans of all races and creeds and to combat racial and religious prejudice in the United States.

Among its other activities directed to these ends, the ADL has filed briefs *amicus curiae* opposing practices and policies which impair the integrity and self-respect of individuals of all races. Briefs have been filed in such cases as *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Brown* v.

Board of Education, 347 U.S. 483 (1954); *NAACP* v. *Alabama*, 377 U.S. 288 (1964); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Runyon* v. *McCrary*, 427 U.S. 160 (1976).

The ADL also supports the rights of all groups to practice their religion free from unjustified governmental interference. The ADL has filed briefs in *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Wallace* v. *Jaffree*, 105 S. Ct. 2479 (1985), and other cases before this Court in support of these vital First Amendment rights.

In the case now before it, the Court is asked to decide whether the Court of Appeals for the District of Columbia Circuit erred in holding that the Air Force, solely in the interest of enforcing a headgear regulation which the Air Force concedes is "arbitrary", can require an Orthodox Jewish psychologist to violate a fundamental religious obligation by prohibiting him from wearing a yarmulke while on duty at an Air Force hospital. As an organization committed to safeguarding religious freedom and constitutional guarantees against arbitrary and overly restrictive regulations, the ADL believes that the fundamental strictures of the First Amendment cannot be cast aside simply because the setting for religious observance is in the military, and that this Court should honor petitioner's modest request to be permitted to wear a yarmulke while serving our country as a psychologist at an Air Force hospital.

The ADL respectfully submits that the decision of the Court of Appeals for the District of Columbia Circuit should be reversed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 734 F.2d 1531. The Findings of Fact and Conclusions of Law of the United States District Court for the District of Columbia are unreported. The opinion of the District Court granting a preliminary injunction is reported at 530 F. Supp. 12.

STATEMENT OF THE CASE

1. The Facts

Petitioner S. Simcha Goldman, an Orthodox Jew who has served with distinction in two branches of the United States military for fourteen years, was assigned, after completing a Ph.D. in clinical psychology in 1977, to work at the Mental Health Clinic of the Air Force Regional Hospital at the March Air Force Base (March AFB) in Riverside, California.[1] As an Orthodox Jew, he wore at all times, as he has done throughout his life, a diminutive head-covering known as a "yarmulke" in fulfillment of a Jewish religious requirement that he keep his head covered at all times.[2] There is no dispute as to the sincerity of petitioner's religious beliefs.

From September 1977 until May 1981, he wore a yarmulke while on hospital duty without incident. There is no record that his wearing a yarmulke disrupted the *esprit de corps* among Air Force personnel at the hospital, that it inhibited teamwork at the hospital, or that the Air Force's other objectives such as "motivation" or "image" were tarnished or undermined. On the contrary, Goldman's performance as an Air Force psychologist was highly praised. He scored high marks on the very professional qualities that the Air Force contends would be imperiled were Goldman

1. Between 1970 and 1972, petitioner, who is an ordained rabbi, served as a chaplain in the United States Navy, "where he wore a yarmulke as a head covering while in uniform without incident." 734 F.2d at 1532.

2. The religious practice of wearing a yarmulke, a head covering worn by observant Jews, is of ancient origin. References to the practice appear in the Talmud, an authoritative compendium of Jewish law completed by approximately 500 C.E. *See Tractate Shabbath*, 118b and *Tractate Kiddushim*, 31a (The Traditional Press 1979). The practice has been firmly established since the Middle Ages. For example, Maimonides wrote in his classic 12th century philosophical treatise, *The Guide to the Perplexed*, Part III, Chapter LII, at 295 (M. Friedlander ed. 1881), that "The great men among our Sages would not uncover their heads because they believed that God's glory was round them and over them. . . ." And Rabbi S.R. Hirsch wrote in his 19th century commentary on the Jewish *Siddur* (prayer book), *Hirsch Siddur*, at 14 (1969), that "[t]he Jew symbolically expresses [submission to God] by keeping his head covered, and in this subordination to God he finds his own honor."

permitted to wear his yarmulke. As the Court below found, "[t]hroughout his service he received consistently outstanding evaluations in each of ten specified areas from his superiors, including the category 'Professional qualities' (Attitude, dress, cooperation, bearing)." 734 F.2d at 1533.

The fact that Goldman wore a yarmulke while working at the hospital caused neither alarm nor opposition; no superior officer during this three and one-half year period raised any objection to Goldman's practice. Only when Goldman wore his yarmulke when testifying as a witness for the defense in a court-martial proceeding was a complaint brought to the March AFB Hospital Commander, Col. Joseph Gregory, alleging that wearing the yarmulke violated Air Force Regulation ("AFR") 35-10.[3] On May 8, 1981, petitioner was first informed by Col. Gregory that he read AFR 35-10 to prohibit wearing a yarmulke by Air Force personnel while in uniform. Col. Gregory offered to let Goldman wear his yarmulke while in the hospital—if Goldman would not wear it elsewhere at March AFB. Petitioner requested permission to continue wearing his yarmulke at all times, consistent with his religious practice. This request was denied.

On June 23, 1981, Col. Gregory ordered Goldman to stop wearing his yarmulke while in uniform anywhere at March AFB. The next day, petitioner was given a letter of reprimand and threatened with sanctions, including a court-martial. On June 25, 1981, petitioner was informed by Col. Gregory that "he had decided to withdraw a positive recommendation he had submitted in favor of [Goldman's] application for a one-year extension of his service in the Air Force and had, that day, submitted a negative recommendation on that application." On June 30, 1981, petitioner was informed that "formal processing of the letter of reprimand was underway." 530 F. Supp. at 13.

3. The regulation, AFR 35-10 § 1-6(h), which sets forth detailed provisions regarding the wearing of headgear, provides in relevant part:

> (2) Headgear will not be worn:
>
> ...
>
> (f) While indoors except by armed security police in the performance of their duties.

2. The Prior Proceedings

On July 2, 1981, Goldman applied for a temporary restraining order enjoining the Air Force from enforcing AFR 35-10 so as to prohibit him from wearing a yarmulke while in uniform. The District Court for the District of Columbia granted this order, and on July 10, 1981, granted Goldman's motion for a preliminary injunction. On April 26, 1982, the District Court permanently enjoined the Air Force from enforcing AFR 35-10 as applied to Goldman. *Goldman* v. *Secretary of Defense*, No. 81-1522 (D.D.C. April 26, 1982). In its Findings of Fact and Conclusions of Law, the District Court, applying *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), concluded that the Air Force failed to present any reasoned analysis or evidence that the "military prohibition of yarmulkes in the interest of discipline overrides individuals' interests in exercising their freedom of religion." *Goldman*, *supra*, at 9, ¶ 9.

Respondents appealed. In an opinion dated May 8, 1984, the Court of Appeals for the District of Columbia Circuit reversed, holding that the Air Force regulation, though not narrowly drawn, must nonetheless be upheld "for the sake of enforcement." 734 F.2d at 1540. The Court of Appeals concluded that the Air Force's interest in uniformity rendered strict enforcement of its regulations permissible. While conceding that "the Air Force has no concrete interest separate from the effect of strict enforcement itself," and though recognizing that Goldman's religious observance implicated a fundamental First Amendment interest, the Court of Appeals concluded that the Air Force was not required to accommodate Goldman's unobtrusive religious practice. With three judges dissenting, the Court rejected petitioner's motion for an *en banc* rehearing. 739 F.2d 657.

In March 1985, the Secretary of Defense issued a Joint Service Study on Religious Matters ("Religious Practice Study") pursuant to a congressional directive contained in Department of Defense Authorization Act, Pub. L. No. 98-525, § 554, 98 Stat. 2532 (1984). The mandate of those conducting the study was to

examine ways to minimize conflict "between the interest of members of the Armed Forces in abiding by their religious tenets and the military interest in maintaining discipline." Religious Practice Study, Executive Summary, at iii. On the issue of religious dress, the study recommended that "[t]he military services should designate living spaces in which religious articles may be worn with the uniform when such wear will not adversely impact unit cohesion". Religious Practice Study, Executive Summary, at xiv. On June 18, 1985, the Department of Defense issued Directive Number 1300.17 (the "Directive"), which established as a goal that the "Military Departments should designate living spaces in which religious articles may be worn with the uniform when wear will not affect adversely unit cohesion." As far as *Amicus* has learned, regulations embodying the Directive have not yet been promulgated by the Air Force. Assuming, *arguendo*, that the Air Force amends AFR 35-10 to comply with the Directive, petitioner would remain prohibited from wearing his yarmulke outside of his barracks. Given the Directive's ambiguity, it is even unclear whether petitioner would be allowed to wear his yarmulke at all times inside his living quarters. Accordingly, his constitutional challenge to the application of military dress requirements that fail to accommodate his free exercise rights and that arbitrarily and unnecessarily conflict with religious practice survives the Directive, even if implemented.

SUMMARY OF ARGUMENT

I. The Court of Appeals erred in concluding that the Air Force was not obligated to reasonably accommodate Captain Goldman's request to wear his yarmulke. This Court, in reviewing constitutional challenges to military regulations or analogous congressional statutes pertaining to national defense, requires that such regulations or statutes be narrowly drawn reasonably to accommodate a serviceman's First Amendment rights. The Air Force, in AFR 35-10, has made no such reasonable accommodation, although the record in this case indisputably confirms that

granting Captain Goldman's request to wear a yarmulke posed no threat to military discipline or cohesion.

II. The Court of Appeals, in reflexively capitulating to the Air Force's predilection for uniformity in matters of attire, impermissibly abdicated its judicial obligation to scrutinize the constitutionality of AFR 35-10. Claiming deference to the "specialized nature of judgments concerning internal military governance," 734 F.2d at 1538, the Court of Appeals also misapplied the deference that is due to the Air Force's "judgment" in this case. The Air Force has merely speculated as to the effect on unit cohesion and discipline of permitting petitioner to wear his yarmulke; such a "judgment" is entitled to no judicial deference.

ARGUMENT

POINT I

AFR 35-10 IS UNCONSTITUTIONAL AS APPLIED TO PETITIONER BECAUSE IT FAILS REASONABLY TO ACCOMMODATE PETITIONER'S FREE EXERCISE RIGHTS

A. Restrictions on the free exercise of religion can ordinarily be justified only by a compelling state interest that could not otherwise be accomplished.

Guided by the historical legacy of the founding of the Republic, the Framers of the Constitution chose through the First Amendment's "free exercise" clause to insulate religious practice from interference by the state. Punishment for "entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance" was strictly prohibited. *Everson* v. *Board of Education*, 330 U.S. 1, 15-16 (1946); *Reynolds* v. *United States*, 98 U.S. 145, 164 (1878).[4] And while religiously grounded conduct may be subject to regulation where conduct or actions have posed some substantial threat to public safety, peace or order, *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963), it is equally axiomatic "that

4. Although not the only religious minority to find America a safe haven, the Jews have particular awareness of the experience of religious persecution and of the importance of these constitutional safeguards. *Everson* v. *Board of Education*, *supra*, 330 U.S. at 9.

there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972). Thus, this Court has upheld conduct guided by religious belief such as the Amish practice of declining to send children to public or private school after they graduate from eighth grade, *Wisconsin* v. *Yoder*, *supra*; a Seventh-Day Adventist's claim of entitlement to unemployment compensation when the individual would not work on Saturday, *Sherbert* v. *Verner*, *supra*; and a Jehovah Witness's right to disseminate religious literature on a street corner, *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

The Court has ruled that "[i]f the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect." *Braunfeld* v. *Brown*, 366 U.S. 599, 607 (1961). Although a regulation may be neutral on its face, the Court has recognized that "in its application, [the regulation may] offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 220; *Thomas* v. *Review Board*, 450 U.S. 707, 717 (1981). Especially when the effect of compliance with state law requires abandonment of a particular religious observance, the Court has been reluctant to compel the individual to choose between compliance and violation of his religious belief. To protect this fundamental constitutional guarantee, the Court has employed heightened scrutiny in reviewing regulations or statutes challenged on free exercise grounds:

> We must . . . consider whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice. In this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

Sherbert v. *Verner*, *supra*, 374 U.S. at 406 (citation omitted). *See also Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 215 ("only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"); *Thomas* v. *Review Board*, *supra*, 450 U.S. at 718.

The free exercise cases, in short, convincingly testify to the weighty concerns implicated when government impinges on matters of religious conscience. There can be no doubt that, in the civilian context, petitioner's right to wear a yarmulke—a religious article obviously posing no threat to public safety, peace or order, *Sherbert* v. *Verner*, *supra*—could not be proscribed or subjected to regulation.

B. The Air Force is constitutionally required reasonably to accommodate petitioner's free exercise rights by promulgating narrowly drawn regulations.

The Court has recognized that these fundamental rights are not forfeited when one enters military service. To the contrary, "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983); *Crawford* v. *Cushman*, 531 F.2d 1114, 1120 (2d Cir. 1976) ("a succession of cases . . . has reiterated the proposition that the military is subject to the Bill of Rights and its constitutional implications").

Historically, the military has endeavored to promote, not obstruct, a serviceman's religious practice. The courts consistently have upheld, if not applauded, the military's concerted effort to keep religious ritual and observance accessible to our servicemen. *See*, *e.g.*, *Abington School District* v. *Schempp*, 374 U.S. 203, 296-98 (1963) (Brennan, J., concurring); *id.* at 308-09 (Stewart, J., dissenting) ("[A] lonely soldier stationed at some far away outpost could surely complain that a government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion."); *Katcoff* v. *Marsh*, 755 F.2d 223, 228 (2d Cir. 1985) (upholding military chaplaincy against constitutional challenge; "the Army has proceeded on the premise that having uprooted the soldiers

from their natural habitats it owes them a duty to satisfy their Free Exercise rights, especially since the failure to do so would diminish morale, thereby weakening our national defense"). The recent Religious Practice Study at iv agrees, noting that "[d]uring the Revolutionary War commanders were tasked with assuring that weekly religious services were conducted. Today a detailed and inclusive command religious program is a vital element in all military units. This program recognizes the importance of religious, spiritual and moral values to service members."

Given the military's historic solicitude for religious observances, its uncompromising objection to petitioner's yarmulke is surprising. The Air Force argues that permitting this inconspicuous religious symbol might in unspecified circumstances undermine morale and discipline. Vague conjecture, however, cannot justify a sweeping prohibition on religious dress appurtenances in the military. Even when national security or defense is at stake, "'[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms'." *United States* v. *Robel*, 389 U.S. 258, 265 (1967), *quoting NAACP* v. *Button*, 371 U.S. 415, 438 (1963). Government regulation in all circumstances must conform to the fundamental and peremptory constitutional precepts that limit the power of government in order to safeguard basic individual rights. As the Court observed in *Rostker* v. *Goldberg*, *supra*, 453 U.S. at 70, "the courts are called upon to decide whether Congress [or here, the military], acting under an explicit grant of . . . authority, has by that action transgressed an explicit guarantee of individual rights which limits the authority so conferred."

Robel, as the Court of Appeals recognized, 734 F.2d at 1536, supplies the guiding principle. "[T]he Constitution requires that the conflict between congressional power [over national security] and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict." *United States* v. *Robel*, *supra*, 389 U.S. at 268 n.20. *Robel* struck down legislation aimed at protecting the Nation's military secrets—a concern of the highest order and certainly on a par with solicitude for military

discipline—because the legislation imposed too substantial a burden on the implied constitutional right of freedom of association. Military regulations no less than congressional enactments must accept that where First Amendment rights are implicated, a regulation must be carefully tailored to minimize constitutional conflict. With respect to military regulations which circumscribe First Amendment freedoms, the inquiry becomes whether those regulations are drafted and applied in a manner that reasonably accommodates the exercise of those basic freedoms.

Brown v. *Glines*, 444 U.S. 348 (1980), is illustrative. Glines, a captain in the Air Force Reserve, solicited signatures protesting Air Force grooming standards in violation of applicable Air Force regulations. Air Force Regulation 30-1(9) prohibited Air Force personnel from soliciting or collecting signatures on a petition "within an Air Force facility . . . without first obtaining authorization from the appropriate commander"; AFR 35-15(3)(a)(1) prohibited the distribution of "any printed or written material ... within any Air Force installation without permission of the Commander." Glines was aware of these regulations, yet failed initially to seek authorization from the base commander.

The Court in that case upheld the challenged regulations, noting that the regulations in question "restrict speech no more than is reasonably necessary to protect the substantial government interest" involved. *Brown* v. *Glines*, *supra*, 444 U.S. at 355. Significantly, the *Glines* regulations, which implemented an Army and Air Force directive, explicitly recognized that the military must make every effort to accommodate even speech critical of the military:

> That directive advises commanders to preserve servicemen's "right of expression . . . to the maximum extent possible, consistent with good order and discipline and the national security" . . . . Thus, the regulations in both services prevent commanders from interfering with the circulation of any materials other than those posing a clear danger to military loyalty, discipline or morale. . . . Indeed, the Air Force regulations specifically prevent

> commanders from halting the distribution of materials that merely criticize the Government or its policies.

Id. at 355.

Glines' facial attack on the regulation failed because the challenged regulation embodied a substantial effort by the Air Force to accommodate First Amendment-protected speech, permitting the military to censure only those materials that "posed a clear danger to military loyalty, discipline or morale."

Greer v. *Spock*, 424 U.S. 828 (1976), is similarly instructive and illustrates the distinction between permissible and impermissible blanket prohibition on First Amendment exercise. The Court in *Spock* made two determinations: first, that the military had authority to ban all political campaign activities within the confines of a military base; second, that the military may require written campaign materials to be submitted for review before distribution on a military installation. The ban on all on-base political demonstrations was upheld as a legitimate attempt to insulate the military "from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates." 424 U.S. at 839. Almost by definition, pursuit of this goal forecloses individualized determination concerning particular political causes. On the other hand, the pre-clearance procedure for written materials was designed to prevent distribution of materials that would constitute " 'a clear danger to [military] loyalty, discipline or morale.' " 424 U.S. at 840. The challenged regulation obviously contemplated particularized review of materials sought to be distributed, and the narrow and principled basis on which distribution could be interdicted was clearly an important factor in the Court's approval of the regulation.

The contrast between the application of AFR 35-10 to preclude all visual religious dress supplementing the Air Force uniform and the regulations upheld in *Brown* v. *Glines* and *Greer* v. *Spock* is striking. Although there can be no dispute that AFR 35-10, as applied, infringes on free exercise by servicemen who are religiously required to wear visible attire supplementing the Air Force uniform, there are no guidelines or procedures for determining

whether particular religious garb would interfere with the objectives that the Air Force seeks to further in mandating dress uniformity. All departures are forbidden. This is not accommodation to the guarantee of religious observance contained in the Bill of Rights and otherwise embraced by the military. Rather, it reflects a rigid, unaccommodating and impermissible disregard of that guarantee in favor of nothing more than military convenience. *Korematsu* v. *United States*, 323 U.S. 214, 244-45 (1944) (Jackson, J., dissenting).

C. Reasonable accommodation requires the Air Force to permit Captain Goldman to wear a yarmulke.

The Air Force justifies its refusal to permit Captain Goldman to wear his yarmulke by retreating behind broad generalizations concerning military discipline, training and *esprit de corps*. With legerdemain and shifting argument, it implies that these ends can only be efficiently served if no deviation is permitted from strict dress uniformity. "Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim." *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 221. Under the principles of *Wisconsin* v. *Yoder* and kindred decisions of this Court, as modified in the military context by *Robel*, *Brown* v. *Glines*, and *Greer* v. *Spock*, the Air Force is required to make a reasoned determination of its ability to relax dress regulations where necessary to accommodate religious freedom in the individual instance, and, on the facts of this case, to permit the wearing of a yarmulke.

1. The Air Force has failed to establish that its objectives would be undermined were Captain Goldman permitted to wear a yarmulke.

The Air Force, although given ample opportunity, has made no attempt to demonstrate how its goals are served by its action in Captain Goldman's case. The government tacitly recognizes that its putative objective of uniform military dress as a vehicle for achieving a cohesive and disciplined fighting force, however unassailable as a general proposition, finds attenuated application to

Captain Goldman's situation and his request for a *de minimus* departure from the Air Force's sartorial standard. Captain Goldman is not trained to fight or to instruct men in combat; he is an Air Force psychologist. His station is a military hospital, not the battlefield or the barracks. The yarmulke that he must wear according to the religious dictates of his conscience is a small and unobtrusive head covering, hardly incongruous with Captain Goldman's otherwise conforming and well-kempt military attire. As might be expected, the record is devoid of any suggestion that the yarmulke has been the occasion for the slightest breach in Air Force discipline or has in any way impacted on Air Force morale or *esprit de corps*. If the constitutional guarantees afforded service personnel are to have genuine import, the military must be required to distinguish those religious practices that compromise legitimate military ends and those, such as petitioner's practice of wearing a yarmulke, that do not. *Cf. Abington School District* v. *Schempp*, *supra*, 374 U.S. at 308 (Goldberg, J. concurring) ("[T]he measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.")[5] If in these circumstances the judiciary were to profess an unwillingness to review and strike a military regulation that impermissibly compromises religious freedom, then the oft-repeated assurance that "one's constitutional rights are not surrendered upon entering the Armed Services," *Middendorf* v. *Henry*, 425 U.S. 25, 50 (1976) (Powell, J., concurring), becomes an empty, misleading platitude.

5. One must conclude that the uncompromising and rigid posture of the Air Force arises out of a failure fully to appreciate the unique and specially protected position freedom of religious observance occupies in the constitutional scheme. The heavy reliance placed by the government on *Kelley* v. *Johnson*, 425 U.S. 238 (1976) and, in the Court of Appeals, *Marshall* v. *District of Columbia Government*, 559 F.2d 726 (D.C. Cir. 1977)—cases dealing with non-religiously based challenges to police grooming regulations—is symptomatic of an inability to distinguish between religious beliefs and other conduct-motivating philosophies and opinions. This confusion is further illustrated by the government's lumping together of "religious, ethnic, or cultural traditions or simply personal taste" (Brief of Respondents in Opposition to Petition for Writ of Certiorari at 5), as if religious practice and personal taste were of the same constitutional dimension.

Unable to explain how the important ends of dress uniformity have been compromised in Captain Goldman's case, the government seizes upon speculative difficulties that might arise from claims for exceptions to the dress code by other servicemen in other circumstances. The spectre is presented of the dress code under attack by a myriad of religious adherents demanding exception to uniform regulations, and the inability of the military to make reasoned decisions with regard to such claims. (Brief for Respondents in Opposition to Petition for Writ of Certiorari at 5-6, 7-8). Here, the government embarks on a flight of conjecture concerning the number and complexion of possible future claims for dress exemptions—rank speculation resting neither on experience nor expertise. Indeed, the only evidence presented by the government at trial was a general study of religious dress and grooming, unconnected with religious observances in the military. (Brief for Respondents in Opposition to Petition for Writ of Certiorari at 5 n.5). Nor does the Religious Practice Study supply any instructive data. It summarizes the religious groups with dress restrictions, but fails to indicate how many servicemen are adherents of these religions, whether there have been any substantial number of requests for deviation from military garb requirements, and the nature of such requests. Religious Practice Study at 107-124. A questionnaire on religious practices in the military is equally uninstructive, since it lumps together servicemen who have worn or will wear turbans, skull caps, sashes, stoles, and medallions without differentiation, and was completed by a grossly unrepresentative cross-section of the military, polling only resident students in the various service schools. Religious Practice Study at 127.

Moreover, the suggestion that requests for religiously motivated exceptions to uniform dress requirements would somehow overwhelm the administrative capabilities of the military is unfounded. The record and the case law reflect only a few instances in which the military has been requested or challenged to make exception for visible religious dress appurtenances. *See* ***Khalsa*** v. ***Weinberger***, 759 F.2d 1411 (9th Cir. 1985) (turban);

Sherwood v. *Brown*, 619 F.2d 47 (9th Cir.), *cert. denied*, 449 U.S. 919 (1980) (same); *Bitterman* v. *Secretary of Defense*, 553 F. Supp. 719 (D.D.C. 1982), *appeal docketed*, No. 83-1177 (D.C. Cir. Feb. 15, 1983) (yarmulke); *Geller* v. *Secretary of Defense*, 423 F. Supp. 16 (D.D.C. 1976) (beard). Abstract and unproven speculation about alleged administrative difficulty or claims of administrative inconvenience cannot serve as an excuse for denying the fundamental right of servicemen to freedom of religious practice. *Cf. Korematsu* v. *United States*, *supra*, 323 U.S. at 244 ("[I]f we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient.")

A like argument advanced by the Air Force (and accepted as dispositive by the Court of Appeals, 734 F.2d at 1540) is that accommodation to certain religious practices would engender hostilities among those groups for whom no exception is made. The argument is equally unpersuasive, yet another instance of a rationale advanced on the basis of sheer speculation unsupported by identifiable military experience. Further, it is at variance with the military's stated lack of concern with claims of "favoritism" in accommodating other religious practices. Religious Practice Study at 95-96 (grumbling by servicemen about religious exemptions from flu shots can be disregarded because it "almost never rises above the nuisance level."). Indeed, it is apparently inconsistent with the Air Force's admitted practice of allowing airmen to wear religious undergarments and ornaments despite the existence of military-issue undergarments, as well as an Air Force regulation which permits the "wearing of rings and bracelets of nonuniform design," which presumably could include an insignia of religious character. *See* 734 F.2d at 1540.[6]

6. Of course, the Air Force could not, under the pretext of facilitating unit cohesion and *esprit de corps*, forbid a religious practice because it tends to arouse anti-Semitic reaction or other religious animosities and biases. "'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'" *City of Cleburne, Texas* v. *Cleburne Living Center, Inc.*, 105 S. Ct. 3249, 3259 (1985), *quoting Palmore v. Sidoti*, 104 S. Ct. 1879, 1882 (1984).

The military might indeed be required to make hard-to-quantify judgments whether a particular item of religious dress falls on one side or the other of the line of acceptable departures from standard military dress. Delineating the line will require particularized determination. *See Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1361 (1984), where the Court noted that "[i]n each case, the [Establishment Clause] inquiry calls for line drawing; no fixed *per se* rule can be framed." The decision whether to permit certain types of dress while precluding others will necessarily depend on differences of degree. *Cf. LeRoy Fibre Co.* v. *Chicago M. & St. P. Ry.*, 232 U.S. 340, 354 (1914) (Holmes, J., concurring) ("The whole law [depends on differences in degree] as soon as it is civilized."). The inherent imprecision of the decisional process does not, however, relieve the military of the constitutional duty to decide each application for religious accommodation on its merits and to permit departure from the dress codes when a reasonable accommodation can be made.

2. In the case of Captain Goldman's yarmulke, the Air Force is clearly required to make exception to AFR 35-10.

Once it is established that the Air Force cannot rely on broad generalizations about the alleged importance of uniform dress to justify an inflexible application of AFR 35-10, Captain Goldman's case becomes an easy one. There is no dispute that "[d]uring his service at March Air Force Base, Goldman's wearing of a yarmulke while in military uniform did not adversely affect the performance of his assigned duties nor the operations at the Base Regional Hospital and did not result in complaints from other personnel." Findings of Fact and Conclusions of Law, *Goldman* v. *Secretary of Defense*, No. 81-1522, at 6, ¶ 14. No evidence was presented by the Air Force to indicate that Captain Goldman's yarmulke had any detrimental influence on teamwork, motivation, discipline, *esprit de corps* or image, the factors identified by the Air Force's expert and accepted by the Court of Appeals as compelling the uniform dress requirements in the

military. Wherever the Air Force may ultimately and legitimately draw the line on unacceptable religious clothing, Captain Goldman's yarmulke undoubtedly falls on the side of permissible dress. This is all that need be determined in this case.

POINT II

NO JUDICIAL DEFERENCE IS DUE THE UNCONSTITUTIONAL DECISION OF THE AIR FORCE NOT TO ACCOMMODATE PETITIONER'S RELIGIOUS PRACTICES

A. The ruling of the Court of Appeals that the military may insist on compliance with its dress regulations simply "for the sake of enforcement" is deference that would arbitrarily strip service personnel of their First Amendment rights.

In upholding the decision of the Air Force forbidding Captain Goldman from wearing his yarmulke, the Court of Appeals has injected the confusing and troubling notion that in its pursuit of cohesion and obedience, the military may promulgate virtually any conduct-regulating rule and insist on its absolutely uniform enforcement. What renders the regulations unchallengeable, according to the Court of Appeals, is that "the Air Force has no concrete interest [in them] separate from the effect of strict enforcement itself. The rules themselves are arbitrary and are enforced up to an arbitrary cutoff point." 734 F.2d at 1540. In short, the less "interest" the military has in a regulation, the more rigidly it may enforce it. This is not even minimal scrutiny of constitutionally infringing military regulations, it is no scrutiny. It is deference to the military run riot.

The notion that the Air Force's interest in uniformity as such inevitably trumps the freedom guaranteed by the Bill of Rights elevates military uniformity to a super-constitutional principle, one occupied by no other interest in American jurisprudence. On this rationale, the military could order all servicemen regularly to attend a randomly selected denominational religious service or to recite a pledge of support for an arbitrarily chosen political party, if such regulations were aimed at troop regimentation or the

conditioning of service personnel to instinctive obedience to command. It is inconceivable, of course, that such regulations could survive constitutional scrutiny. *See Anderson* v. *Laird*, 466 F.2d 283, 295 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972), striking down compulsory chapel attendance at military academies as a violation of the Establishment and Free Exercise Clauses. Even if the ends be legitimate and even if they be ends of national security, the means are unacceptable if they violate the " 'letter and the spirit' of the First Amendment." *United States* v. *Robel*, *supra*, 389 U.S. at 268 n.20. Dress uniformity in the military, like any other military rule or practice, must bend to accommodate First Amendment rights of the individual serviceman, if accommodation is possible without realistically compromising the identified purposes of military morale, obedience and cohesion.

Furthermore, this Court in its review of challenges to military law or conduct implicating military self-governance, has always identified a principled basis for deferring to military judgment. For example, *Middendorf* v. *Henry*, *supra*, *Parker* v. *Levy*, 417 U.S. 733 (1974), and *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), involved the unique character of military justice and were clearly informed by the existence of a legislatively enacted Code of Military Justice. *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), and *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), in which expressions of deference to military expertise are most striking and pronounced, dealt with requests that the Court oversee military training and the duty assignment of servicemen. In declining the invitation, the Court forcefully explained that it would not presume to second-guess the military in matters paradigmatic of the military's specialized expertise. Out of kindred concerns in *Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983), the Court refused to infer a *Bivens*-type constitutional tort in favor of servicemen against their superiors, because to do so would in effect "tamper with the established relationship between enlisted personnel and their superior officers." While solicitous of the prerogatives of the military commanders in their proper sphere, these cases do not

relegate to military discretion the First Amendment rights of servicemen.

By contrast, the Air Force in this case possesses no equivalent specialized expertise. It has failed to adduce any evidence that permitting Captain Goldman to wear a yarmulke has or would incur resentment from other servicemen. In short, the Air Force has merely speculated, without factual foundation, as to the effect of excepting petitioner from the requirements of AFR 35-10. Under the circumstances, the Air Force's "judgment" is entitled to no judicial deference.

B. The judiciary's lack of specialized expertise in military matters does not render military judgments on constitutional issues non-reviewable.

The Court of Appeals' too-ready conclusion that it can offer no insight into the possible effect of petitioner's continued wearing of a yarmulke because of the military's alleged expertise in such matters misses the mark for another reason. Even in the civilian context, the judiciary is called upon to rule upon the regulations and judgments of uniquely qualified experts in disciplines which lie outside the ordinary realm of judicial competence. On more than one occasion, this Court has passed judgment on matters involving highly technical scientific inquiries, far more esoteric that the rather common sense issue presented in this case, where lay persons would hardly presume to challenge adequately articulated decisions of experts. *See, e.g., Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607 (1980), striking down OSHA standards for airborne benzene in the workplace; *American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490 (1981), upholding OSHA's cotton dust standard. In cases such as these, the judiciary does not attempt to second guess the qualified professional's technical judgment. Rather, the court probes whether such judgment has in fact been exercised in a manner consistent with governing legal parameters. In the oft-repeated aphorism of *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965), "[t]he deference owed to an

expert tribunal cannot be allowed to slip into a judicial inertia. . . ."

If this philosophy of judicial review guides the Court in its congressionally authorized oversight of administrative agencies, it is certainly one which must find application in review of regulations that cramp the exercise of basic First Amendment rights in the military. The "very essence of judicial duty", *Marbury* v. *Madison*, 1 Cranch 137, 178 (1803), is the implementation and protection of the constitutional scheme. In constitutional matters, the Court and not the military is the expert. As Justice Douglas observed, concurring in *Parisi* v. *Davidson*, 405 U.S. 34, 54-55 (1972):

> [M]atters of the mind and spirit, rooted in the First Amendment, are not in the keeping of the military.... When the military steps over those bounds, it leaves the area of its expertise and foresakes its domain. The matter then becomes one for civilian courts to resolve, consistent with the statutes and with the Constitution.

See also West Virginia State Board of Education v. *Barnette*, 319 U.S. 624, 640 (1943), observing that "[The Court] cannot because of modest estimates of . . . competence[,] withhold the judgment that history authenticates as the function of this Court when liberty is infringed."

The position taken by the government and endorsed by the Court of Appeals, that the decision of the Air Force to prohibit all departure from standard dress be upheld largely because of the deference due the military, is an invitation to the judiciary in a most sensitive constitutional area to "abdicate [its] ultimate responsibility," *Rostker* v. *Goldberg*, *supra*, 453 U.S. at 67. The invitation is contrary both to the jurisprudence of the Court and elementary logic. Neither extensive military experience nor years of involvement in the military milieu is required to realize that the Air Force has not made an honest attempt narrowly to draw AFR 35-10 to accommodate the rights of the petitioner in this case.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully submits that the judgment of the Court of Appeals for the District of Columbia Circuit holding AFR 35-10 constitutional as applied to petitioner should be reversed.

Respectfully submitted,

DANIEL P. LEVITT
KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL
919 Third Avenue
New York, New York 10022
(212) 715-9100

Of Counsel:

SIGMUND S. WISSNER-GROSS
ABBE L. DIENSTAG
KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL
919 Third Avenue
New York, New York 10022

JUSTIN J. FINGER
JEFFREY P. SINENSKY
JILL L. KAHN
Anti-Defamation League of B'nai B'rith
823 United Nations Plaza
New York, New York 10017

Attorneys for Amicus Curiae

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

S. SIMCHA GOLDMAN,
Petitioner,

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF OF THE AMERICAN JEWISH COMMITTEE AND CHRISTIAN LEGAL SOCIETY AS AMICI CURIAE SUPPORTING PETITIONER

SAMUEL RABINOVE
RICHARD T. FOLTIN
THE AMERICAN
JEWISH COMMITTEE
165 E. 56th Street
New York, New York 10022
(212) 751-4000

SAMUEL ERIC HANS ERICSSON
Counsel of Record
KIMBERLEE WOOD COLBY
CHRISTIAN LEGAL SOCIETY
P.O. Box 1492
Springfield, VA 22151
(703) 941-3192

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the government may compel a military psychologist to violate his deeply held religious convictions by prohibiting his wearing an unobtrusive yarmulke.

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BRIEF OF THE AMERICAN JEWISH COMMITTEE AND CHRISTIAN LEGAL SOCIETY AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICI CURIAE

The American Jewish Committee ("AJC"), a national organization of approximately 50,000 members, was founded in 1906 to protect the civil and religious rights of Jews. It is the AJC's conviction that the civil and religious rights of Jews will be secure only when the civil and religious rights of Americans of all faiths are equally secure. To fulfill this aspiration, the American Jewish Committee strongly supports the First Amendment principle of separation of religion and government, which is encapsulated in both the Establishment Clause and the Free Exercise Clause. One corollary of this principle is that only when justified by the com-

pelling interests of society may the state prevent an individual from carrying out a practice dictated by his religious beliefs.

The Christian Legal Society is a non-profit professional association of 3,500 Christian judges, attorneys, law professors, and law students, founded in 1961. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect and promote the freedom of both Christians and other persons in the exercise of their religious beliefs. The Christian Legal Society believes that accommodation by the state of the individual citizen's religious beliefs, as required by the First Amendment, strengthens the individual citizen's respect for, and allegiance to, our constitutional government.

SUMMARY OF ARGUMENT

Captain Goldman is a clinical psychologist in a military hospital, whose service record has been excellent. For many years, he has worn an unobtrusive yarmulke while working, in accordance with his deeply held religious convictions as an Orthodox Jew. After several years of meritorious service, he was ordered to remove his yarmulke while working, an order directly contrary to his traditional and sincerely held religious beliefs.

The First Amendment requires the state to accommodate an individual citizen's sincerely held religious beliefs, unless a compelling state interest exists, unachievable by less restrictive means. On the facts of this case, in which the wearing of a yarmulke was unchallenged for several years, the military's interest in enforcement of its regulations, merely for the sake of enforcement, does not constitute a state interest of the necessary magnitude to justify abridgment of a serviceman's free exercise rights. Under the First Amendment, Captain Goldman may serve both his religion and his country.

ARGUMENT

I. THE CONSTITUTION REQUIRES THAT STATE REGULATORY ACTIVITY ACCOMMODATE THE FREE EXERCISE OF RELIGION, EXCEPT WHERE TO DO SO WOULD BE INCOMPATIBLE WITH SOCIETY'S COMPELLING INTERESTS.

Normally, when government acts within the limits of its powers, it is entitled to expect that its laws will prevail over individual beliefs. The "concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-16 (1972). Even religious belief cannot "permit every citizen to become a law unto himself." *Reynolds* v. *United States*, 98 U.S. 145, 167 (1878). However, where an impediment to individual religious activity is traceable to state action, the Court has recognized that the Free Exercise Clause often compels the government to remove or mitigate such state-imposed impediments. Because of the high value that the Framers placed on religious liberties, this Court's cases have emphasized that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U.S. at 215 (1972).

Thus, the principle of "accommodation" has been properly invoked by the Court to resolve the conflict between a state-created program of regulations and an individual's religious beliefs. Indeed, it is the very fact of that state-created conflict which the Court has relied upon to rebut the argument that "an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause." *Wisconsin* v. *Yoder*, 406 U.S. at 220-21.

Such accommodation is not contrary to this Court's recent reaffirmation in *Wallace* v. *Jaffree*, 105 S.Ct. 2479,

2492 (1985), of "the established principle that the Government must pursue a course of complete neutrality toward religion." As one noted commentator has stated, neutrality as understood by the Court is *not* a " 'strict neutrality' theory, which would hold that 'government cannot utilize religion as a standard for action or inaction because [the two religion clauses] prohibit classification in terms of religion either to confer a benefit or impose a burden.' " L. Tribe, *American Constitutional Law* 821 (1978), *quoting* P. Kurland, *Religion and the Law* 18 (1962). So to understand the Religion Clauses would ignore an existential reality: a seemingly neutral statute may, under certain circumstances, have an unnecessarily greater negative impact upon a religious than upon a nonreligious person because of the former's religious obligations. Rather, this Court has affirmed:

> The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief.

School District of Abington Township v. *Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., joined by Harlan, J., concurring). This notion of neutrality—which requires, as an essential element, that state action "work deterrence of no religious belief"—clearly contemplates that there may be times when, in order to ensure that state action is neutral with respect to *effect*, a religion-conscious accommodation will be permissible (see *Zorach* v. *Clauson*, 343 U.S. 306 (1952)) or, at times, compelled. See *Sherbert* v. *Verner*, 374 U.S. 398 (1963).[1]

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[1] The principle of accommodation is consistent with this Court's recent holding in *Thornton* v. *Caldor*, 105 S.Ct. 2914 (1985), which struck down, as a violation of the Establishment Clause, Connecticut's statute which provided Sabbath observers with an absolute and unqualified right not to work on their chosen Sabbath. That so-called "accommodation" involved no *state action* which deterred religious practice. Because it attempted "to lift a burden

This Court's cases have outlined the areas in which a state's interest is not deemed sufficiently compelling to override a claim to free exercise of religion, so that accommodation of religious practice is required. The state may not engage in regulative activity which has the effect of compelling or prohibiting, regulating, or taxing the expression of religious beliefs, where a more narrowly drawn regulation would suffice to serve the state's compelling interests. See *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961). Neither may a state enact a qualification for public service which, without sufficient connection to a legitimate government objective, deters an individual from engaging in activities compelled, or powerfully induced, by his religious beliefs. *See, e.g., McDaniel* v. *Paty*, 435 U.S. 618 (1978). Such actions with respect to religion clearly lie outside the government's ambit of authority. Similarly, where a government-mandated system of compulsory education poses obstacles to deeply held religious beliefs, believers are guaranteed an opportunity to send their children to privately financed religious schools or, in certain situations, to refrain from schooling altogether. *See generally, Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), and *Wisconsin* v. *Yoder*, *supra*. A public system of unemployment compensation that provides no benefits to persons who voluntarily refrain from work may not deny coverage to an employee whose resignation was precipitated by a conflict between work requirements and sincere religious convictions. *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Sherbert* v. *Verner*, *supra*.

Thus, this Court has limited governmental regulation of overt acts prompted by religious principles to cases

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on religious practice . . . imposed by *private* employers" it was "not the sort of accommodation statute specifically contemplated by the Free Exercise Clause." *Id.* at 2919 (O'Connor, J., concurring). See *Wallace* v. *Jaffree*, 105 S.Ct. at 2497 (O'Connor, J., concurring).

where the regulated conduct poses "some substantial threat to public safety, peace or order." *Sherbert* v. *Verner*, 374 U.S. at 403 (1963). The cases in which this Court has upheld the claim of governmental authority against a free exercise challenge uniformly fit within these narrow categories.[2] Thus, the interest of the state is not only valid but compelling in matters of health and child welfare, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (child labor laws enforceable so as to prevent children's sale of religious literature), or where the duty from which an individual seeks exemption is one of the essential responsibilities of citizenship in our modern society, necessary to preserve peace or the orderly operation of society. See *Gillette* v. *United States*, 401 U.S. 437, 461-462 (1971) (no free exercise right to avoid military service based upon religiously-based conscientious objection to a particular war);[3] *United States* v. *Lee*, 455 U.S. 252 (1982) (no free exercise right to avoid paying taxes).[4]

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[2] An additional category of "morals" is sometimes added. Obviously, this is not taken to mean that government may decide which religions are "moral" or "immoral". Rather, this category is not altogether distinct from threats to "public order", in that restrictions are justifiable only when the conduct in question assaults one of the most fundamental bedrock values of our society or legal order, such as the principle of nondiscrimination embodied in the Fourteenth Amendment or the prohibition of polygamy. *Bob Jones University* v. *United States*, 460 U.S. 574 (1983); *Reynolds* v. *United States*, 98 U.S. 145 (1878).

[3] While there may not be a First Amendment right to avoid military service on religious grounds, this Court has clearly established that the allowance of such accommodation of religious belief (broadly defined) is within Congress' prerogative. *Welsh* v. *United States*, 398 U.S. 333 (1970); *United States* v. *Seeger*, 380 U.S. 163 (1965).

[4] The decision in *Lee* was predicated on the realistic assessment that the social security system is not an individual "insurance" system (from which a religious group providing its own system of social and personal insurance might legitimately claim exemp-

By way of contrast, this Court has found even compelling state interests insufficient to override a claim to exemption from state programs, based upon religious belief, where granting the religious claim would cause no harm to others and would involve only *de minimis* alterations of a governmental legislative or regulatory scheme. *See, e.g., Wisconsin* v. *Yoder, supra* (state compulsory education laws); *Thomas* v. *Review Board, supra* (state unemployment benefits system); *Sherbert* v. *Verner, supra* (same).

II. THE MILITARY IS REQUIRED BY THE FREE EXERCISE CLAUSE TO MAKE THE NARROW AND MINOR REGULATORY EXCEPTION SOUGHT BY PETITIONER.

Were it not for the military setting in which this case arises, there would be no question whatever, based upon the principles enunciated above, that the precedents of this Court would compel judgment for Captain Goldman. The case at bar involves a claim to a minor exception from governmental rules imposed for the sake of uniformity and administrative convenience. The legitimacy and sincerity of the claimant's religious belief is unchallenged. Captain Goldman asks for no special benefits of a substantive nature; nor does he ask for exemption from fundamental duties incident to citizenship in the nation, such as payment of taxes, or availability for military service; nor does the exception sought interfere with any government rule designed to insure safety, peace, health or public order. All Captain Goldman asks is that civil government "accommodate[] the public service to [his] spiritual needs." *Zorach* v. *Clauson*, 343 U.S. at 314 (1952). Notwithstanding the military setting, a fair application of

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tion), but a system of general taxation and transfer payments and, as such, indistinguishable from the obligation to pay taxes generally. 455 U.S. at 258 ("mandatory participation is indispensable to the fiscal vitality of the social security system"). See U.S. Const. Amend. XVI.

the Free Exercise Clause requires that Captain Goldman be granted the narrow, limited exception which he seeks from the dress regulations promulgated by the United States Air Force.

This Court has consistently provided more that its usual "customary deference" to a coequal branch of government in determining the constitutionality of congressional judgments with respect to the national defense and military matters. See *Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983); *Rostker* v. *Goldberg*, 453 U.S. 57, 64-66 (1981). Nevertheless, the Court explicitly has acknowledged that military matters are subject to constitutional limitations, stating:

> None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as in any other, Congress remains subject to the limitations of the Due Process Clause, but the tests and limitations to be applied may differ because of the military context. We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice.

Rostker, 453 U.S. at 67 (citations omitted).

In according this deference, however, this Court explicitly declined the Government's invitation further to refine the applicable tests, where allegations of constitutional violations are directed at the military, so as to require only that challenged regulations bear a "rational relation to some legitimate Government purpose". *Id.* at 69. To the contrary, this Court explicitly noted that it had *not* previously applied "a different equal protection test because of the military context," *id.* at 71 (citing *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975)), and proceeded to determine whether the challenged "action transgressed an explicit guarantee of individual rights", even in light of the judicial deference to congressional mili-

tary expertise. *Id.* at 70. Whatever the appropriate standard for examination of a military determination subject to constitutional challenge (whether "strict scrutiny" or an intermediate standard), it is clear, under *Rostker*, that there is a judicial obligation to determine whether individual rights guaranteed by the Constitution—be they the right of free exercise or the right to equal protection —have unjustifiably been subject to encroachment.

The court below acknowledged its constitutional obligation, consonant with *Rostker*, to determine whether the Air Force's refusal to accommodate the requirements of its dress code to Captain Goldman's religiously compelled requirements to wear a yarmulke served "legitimate military ends . . . sought to be achieved by means designed to accommodate the individual right to an appropriate degree." 734 F.2d 1531, 1536. However, notwithstanding this acknowledgment, the Court of Appeals failed properly to balance "legitimate military ends" against "individual rights." Rather, the Court of Appeals abdicated even the limited role which the judiciary must play in the context of the military. This appears evident from the Court of Appeals' own enumeration and assessment of the Air Force's justifications for its refusal to accommodate Captain Goldman's religious practices.

Thus, the Court of Appeals rightly found "unpersuasive" the Air Force's argument that one reason for scrupulous uniformity with respect to its dress code is safety, finding that "more narrowly drawn regulations, accommodating religious practices to a greater degree, would satisfy such safety concerns". 734 F.2d at 1539. The court also noted the potential weakness of the argument that "if members of numerous other religions with distinctive garb flood the Air Force with requests for exemptions, . . . severe disruption would result", by observing that "[t]his argument assumes that substantial numbers of these sects have enlisted and would be likely to request exemptions. . . ." *Id.*

The Court of Appeals further found "weak" an Air Force argument that "it cannot reasonably distinguish [the relative obtrusiveness] among various religious practices, but must either allow or disallow all requested exceptions." *Id.* In a telling critique of this Air Force rationale, the Court of Appeals stated:

> [It] appears that the Air Force *already* distinguishes among practices that may be religious, for the regulations permit certain deviations from complete visible uniformity, such as the wearing of rings and bracelets of nonuniform design, see AFR 35-10 § 1-12(b)(1)(b), and have been interpreted to allow the wearing of nonuniform undergarments and ornaments, provided they are not visible beneath the required uniform, despite the existence of military-issue undergarments. The Air Force, therefore, does distinguish, for example, Mormons who wear "temple garments" underneath their outer clothing from Orthodox Jews, whose religious garb, though visible, is nearly as unobtrusive. If obtrusiveness is the underlying standard actually employed in making these distinctions, the Air Force arguably should be required to employ it in a more thoroughgoing manner, in order to accommodate rights of free exercise to the greatest possible extent.

Id. at 1540.

Having effectively rebutted the Air Force's assertion that the challenged regulations were necessarily connected to various purported regulatory purposes, the Court of Appeals nonetheless abruptly concluded that:

> [T]he peculiar nature of the Air Force's interest in uniformity renders the strict enforcement of its regulation permissible. That interest lies in the enforcement of regulations, not for the sake of the regulations themselves, but for the sake of enforcement. Its regulations are necessarily arbitrary . . . . Unlike the states in *Wisconsin* v. *Yoder*, *Thomas* v. *Review Board*, and *Sherbert* v. *Verner*, whose interests in enforcing their rules would not be greatly impaired

> by making exceptions when enforcement would not serve the purpose underlying the rules, the Air Force has no concrete interest separate from the effect of strict enforcement itself.

Id. This finding was premised on the Air Force's assertion that flexibility as to Captain Goldman's religious claim would breed resentment among other servicemen and thereby adversely affect discipline.

Thus, the challenged regulations were, in essence, upheld by the Court of Appeals *solely* because the military's need for discipline requires uniform adherence to its rules, no matter how arbitrary and regardless of countervailing constitutional considerations. The rationale that uniform application of regulations is necessary for its own sake may be justifiable when fundamental constitutional rights are *not* directly and uncontrovertibly implicated. However, when a fundamental constitutional right is undeniably at stake, to uphold governmental regulations without further judicial inquiry is to create a standard of inquiry which places virtually any military action beyond review of the courts. Manifestly, any regulation, having otherwise failed of justification, can be justified as necessary not for its own sake, "but for the sake of enforcement." As Judge Starr, dissenting from the denial of the petition for a rehearing *en banc*, cogently stated:

> Not a scintilla of evidence in the record suggests that [Petitioner's] wearing of a yarmulke caused any resentment whatever in others. The claim is contradicted by expert testimony, credited by the trial court, that making exceptions to accommodate deeply held religious beliefs would defuse rather than cause resentment. The claim is also at odds with common sense. Reasonable servicemen would more justly be annoyed with the mechanical enforcement of arbitrary rules that prevent the wearing of such unobtrusive symbols of religious faith while allowing others to wear religious rings and bracelets.

739 F.2d 657, 659. It should be stressed in this regard that Captain Goldman wore his yarmulke on duty for many years, with no hint of "resentment" among his fellow servicemen. *Id.*

The Air Force's justification for enforcement of an admittedly arbitrary dress regulation, in the face of Captain Goldman's religiously-compelled obligation to wear a small skullcap which is neither obtrusive nor displaces military dress, runs counter to expert testimony and common sense. Moreover, it runs counter to the fundamental notion that the Free Exercise Clause requires "those in authority to accommodate those who wish to exercise their religious liberties, unless the accommodation would prove unduly burdensome." *Id.* Even the appropriately great deference that this Court must allow to the military with respect to determination of its own needs cannot allow the Air Force to sweep aside First Amendment guarantees, with no more than conclusory assertions, contradicted by the record and by common sense.

The imperative that the Court diligently pursue its obligation to determine whether the accommodation of religion sought by Captain Goldman "would prove unduly burdensome" is made even more compelling when one considers that the Air Force's mechanical enforcement of an arbitrary dress regulation prevented Captain Goldman's wearing of an unobtrusive symbol of religious faith even while allowing others to wear, for religious reasons, items of apparel which were not part of the standard uniform. The Court of Appeals itself acknowledged, in rebutting the claim that the prevention of "obtrusiveness" had been the Air Force's guiding principle, that:

> [It is] no answer to assert . . . that wearing rings and special undergarments are not exceptions to the uniform requirements, on the ground that the regulation specifically allows them, because the reason for the difference in treatment of various nonstand-

> ardized articles of clothing and ornaments, rather than the fact of the difference, would [then] be at issue.

734 F.2d at 1246. However, the Court of Appeals' ruling, premised on the military's assertion that the uniformity imposed by the dress regulation is necessary for the sake of enforcement, raises exactly that issue—the issue of why regulations were enacted allowing one variety of religious observance, while, at the same time, other regulations forbid a practice of another faith which is indistinguishable in terms of obtrusiveness or interference with duty. Not only free exercise concerns, but also weighty concerns of equal protection, are raised when the military may arbitrarily, and without objectively verifiable justifications, ordain that certain religiously-compelled dress requirements are forbidden and others are not.

In the absence of any evidence supporting the justifications espoused by the Air Force for its failure to accommodate Captain Goldman, accommodation is required. In the alternative, at the least, this matter should be remanded for further evidence with respect to those justifications.

CONCLUSION

Accordingly, *amici curiae* urge this Court to reverse the judgment of the court below.

Respectfully submitted,

SAMUEL RABINOVE
RICHARD T. FOLTIN
THE AMERICAN
JEWISH COMMITTEE
165 E. 56th Street
New York, New York 10022
(212) 751-4000

SAMUEL ERIC HANS ERICSSON
Counsel of Record
KIMBERLEE WOOD COLBY
CHRISTIAN LEGAL SOCIETY
P.O. Box 1492
Springfield, VA 22151
(703) 941-3192

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IN THE

Supreme Court of the United States

October Term, 1984

S. SIMCHA GOLDMAN,

Petitioner,

v.

CASPER W. WEINBERGER, Secretary of Defense, *et al.*,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF, THE SYNAGOGUE COUNCIL OF AMERICA AND THE AMERICAN CIVIL LIBERTIES UNION

AMICI CURIAE

RONALD A. KRAUSS
Counsel of Record
LOR[illegible]. WALDMAN
M[illegible] D. STERN
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500

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INTEREST OF THE AMICI

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, economic and political rights of American Jews and all Americans. It is committed to the preservation of the great freedoms secured by the First Amendment to the Constitution, especially the rights secured by the Establishment and Free Exercise clauses. To further these ends, AJCongress has filed briefs amicus curiae in numerous cases in state and federal courts in which the meaning of the religion clauses has been at issue.

As an organization representing a religious minority, AJCongress is concerned that the power of government not be used arbitrarily to suppress easily accommodated free exercise of religion. In particular, AJCongress seeks to ensure that the patriotic desires of Orthodox Jews to serve their

country in the Armed Forces are not thwarted without compelling reasons.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of:

Central Conference of American Rabbis, representing the Reform rabbinate;

Rabbinical Assembly, representing the Conservative rabbinate;

Rabbinical Council of America, representing the Orthodox rabbinate;

Union of American Hebrew Congregations, representing the Reform congregations;

Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations;

United Synagogues of America, representing the Conservative congregations.

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members. It was founded over 60 years ago and is dedicated to defending and preserving the principles embodied in the Bill of Rights. The ACLU has been involved in many of the leading First Amendment cases in which Free Exercise rights have been threatened.

This case pits a fundamental constitutional right -- free exercise of religion -- against the government interest in military discipline. The particular issue it raises is whether the right of an Air Force Captain to exercise his religion by unobtrusively covering his head while indoors is outweighed by the Air Force's asserted need for strict adherence to arbitrary regulations forbidding such headcovering. The broader issue it raises is whether an Orthodox Jew who wishes to serve his country is unwelcome in the Air Force.

This brief is submitted with the consent of the parties.

STATEMENT OF THE CASE

Facts

Since 1970, petitioner S. Simcha Goldman, an Orthodox Jew, has served his country with distinction. First, after receiving his rabbinical ordination, he served as a Navy chaplain. Later, after completing a Ph.D degree in clinical psychology, he entered active duty in the Air Force as a captain and was assigned to the Mental Health Clinic at the March Air Force Base Hospital in California. Throughout his military service, Goldman consistently received outstanding evaluations from his superiors. Goldman v. Secretary of Defense, 734 F.2d 1531, 1532-33 (D.C. Cir. 1984).

In accordance with Orthodox Jewish law, Goldman has, since boyhood, kept his head covered at all times. During his Air

Force Service, Goldman, when outdoors, wore the regulation Air Force cap; when indoors, he wore a "yarmulke," a small cloth skullcap.* For the first three and one half years of his Air Force service, Goldman's yarmulke never occasioned any complaints or suggestions that his unobtrusive addition to the normal Air Force uniform was improper, or affected anyone's performance in any way.

In May 1981, however, Goldman's superior officer told him that wearing a yarmulke indoors, while in uniform, violated Air Force Regulation 35-10 §1-6(h) (2)(f)** ["AFR 35-10"] and he ordered Goldman to re-

* For Orthodox Jews, the wearing of a "yarmulke" (a word of Yiddish origin) is a sign of allegiance to the Jewish religion. There is no dispute as to the bona fides of Goldman's religious belief. See Goldman, 734 F.2d at 1537; Brief of Solicitor General In Opposition to Petitioner for Writ of Certiorari at 4-13, Goldman v. Weinberger.

** AFR 35-10 §1-6(h)(2)(f) requires that "headgear will not be worn...[w]hile indoors except by armed security personnel in the performance of their duties."

move it, or face court-martial. This litigation ensued.

Proceedings Below

In July 1981, Goldman filed this suit for injunctive relief and damages challenging AFR 35-10 as a restraint on his First Amendment free exercise rights. After a hearing that was consolidated with a trial on the merits, the district court granted Goldman injunctive relief.

On appeal, the U.S. Court of Appeals for the District of Columbia Circuit reversed. Goldman v. Secretary of Defense, 734 F.2d 1531 (D.C. Cir. 1984). The Court of Appeals relied on Rostker v. Goldberg, 453 U.S. 57 (1981) as setting the standard of review for evaluating Goldman's Free Exercise claim against the government's power to enforce military regulations.. The Court of Appeals held that the "peculiar nature of the Air Force's interest in uniformity" per-

mits strict enforcement of regulations prohibiting any headcovering indoors, even though, the Court of Appeals conceded, those regulations "are arbitrary." Goldman, supra, 734 F.2d at 1540.

. Goldman petitioned the Court of Appeals for rehearing en banc, which the Court of Appeals denied, Goldman v. Secretary of Defense, 739 F.2d 657 (D.C. Cir. 1984). Three Circuit Judges dissented, however, with Judge Starr finding "[t]he treatment of Dr. Goldman.... patently unconscionable." Goldman, supra, 739 F.2d at 659. Judge Starr reasoned that although "the judiciary is singularly ill-equipped to sit in judgment on military personnel regulations....the panel decision abdicates the judiciary's limited but important function in the extraordinarily delicate environment of military personnel." Id. at 658. Judges Ginsburg and Scalia concurred in Judge

Starr's dissent, stating that the Air Force regulation indicated "callous indifference" to Goldman's religious belief. Id. at 660.

This Court granted a writ of Certiorari. 53 U.S.L.W. 3881 (June 17, 1985).

SUMMARY OF ARGUMENT

Strict enforcement of AFR 35-10, by prohibiting Capt. Goldman from wearing a yarmulke indoors, severely restrains his Free Exercise rights. Such governmental action -- even by a military entity entitled to no little judicial deference -- is permitted only when the restraint fulfills two conditions: 1) it achieves a compelling interest; and 2) it achieves that interest in the least restrictive means possible. Thomas v. Review Board, 450 U.S. 707 (1981). Neither of those conditions is fulfilled in this case.

Moreover, this Court should not defer to military judgment concerning a uniform dress regulation that is demonstrably arbitrary, serves no substantive military purpose, and discriminates against Orthodox Jews.

ARGUMENT

THE FREE EXERCISE CLAUSE DOES NOT PERMIT THE AIR FORCE TO EXCLUDE ORTHODOX JEWS FROM AIR FORCE SERVICE

AFR 35-10 prohibits Air Force personnel from wearing "headgear" while indoors. Because petitioner sincerely holds the religious belief that he must keep his head covered at all times, strict enforcement of AFR 35-10 forces petitioner -- or any other Orthodox Jew -- to choose between adhering to his religious beliefs or serving his country in the Air Force. It is "a cruel choice," Braunfeld v. Brown, 366 U.S. 599, 616 (1961)(Stewart, J., dissenting).

See Sherbert v. Verner, 374 U.S. 398 (1963) (unconstitutional to force choice between following religious precepts and forfeiting government benefits).

Without question, military discipline demands some sacrifice of personal liberty by those who serve in the armed forces. If the Air Force had a compelling interest in enforcing AFR 35-10, that "cruel choice" might be inescapable for petitioner. But no such interest exists here. Strict enforcement of AFR 35-10 is no more than "[s]lavish devotion to arbitrary rules [and] is precisely the opposite of the spirit of accommodation which the Constitution, as interpreted by the Supreme Court, requires." Goldman v. Secretary of Defense, 739 F.2d 657, 659 (D.C. Cir. 1984)(Starr, J., dissenting from denial of petition for rehearing en banc).

A. Restrictions Of Free Exercise Rights Require Justification By The Least Restrictive Means of Achieving A Compelling Interest

Professor, later Chief Justice, Stone, writing in 1919, eloquently articulated the primary importance of respecting the religious beliefs of those who cannot comply with society's demands without violating their conscience:

> [B]oth morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.

Stone, The Conscientious Objector, 21 Col. Univ. Q. 253, 269 (1919).

This respect for the integrity of individual conscience is no abstract principle; it is a fundament of our law, embodied in the Free Exercise Clause. This Court has recognized the primacy of the Free Exercise Clause by requiring that only paramount governmental interests will defeat claims arising under it.

1. Strict Scrutiny is the Standard for Judging Free Exercise Restraints

In an unbroken line of cases, this Court has consistently held that government may burden religious liberty only when such a burden "is essential to accomplish an overriding governmental interest." United States v. Lee, 455 U.S. 252, 257-58 (1982). In Thomas v. Review Board, 450 U.S. 707 (1981), Chief Justice Burger, quoting from his earlier opinion in Wisconsin v. Yoder, 406 U.S. 205 (1972), reaffirmed the Supreme Court's unwavering fidelity to the

strict scrutiny standard in Free Exercise cases:

> The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order ... can overbalance legitimate claims to the free exercise of religion." Wisconsin v. Yoder, supra, 406 U.S. at 215.

Thomas v. Review Board, 450 U.S. at 718. Accord Gillette v. United States, 401 U.S. 437 (1971); Sherbert v. Verner, 374 U.S. 398 (1963).

2. Strict Scrutiny of Free Exercise Restraints Applies to Air Force Regulations

This Court has never addressed specifically what level of scrutiny it would apply to restraints on Free Exercise by the military. Both law and logic, however, de-

monstrate that the general rule of strict scrutiny should apply.*

First, as a matter of law, when the Court has addressed military restraints on other First Amendment rights, it has applied no lesser degree of scrutiny. In United States v. Robel, 389 U.S. 258 (1967), a Communist Party member challenged the constitutionality of the Subversive Activities Control Act of 1950, which provided, inter alia, that it was unlawful for Communist Party members to "engage in any employment in any defense facility." The Court acknowledged Congress' "power to safeguard [the country's] vital interests," id. at 267, by protecting the nation against spies and sab-

* None of the cases involving Free Exercise restraints by civilian government in any way support a military exception to the strict scrutiny rule. See United States v. Lee, supra; Thomas v. Review Board, supra; Wisconsin v. Yoder, supra; Gillette v. United States, supra; Sherbert v. Verner, supra.

oteurs, but nevertheless held the Act unconstitutional.

The Court reasoned that the means Congress chose to limit defense employees' mere membership in the Communist Party was unnecessarily restrictive:

> When legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms.

389 U.S. at 268.* See Shelton v. Tucker, 364 U.S. 479 (1960).

* Justice White dissented in Robel, primarily on the grounds that the majority weighed too lightly the government interest in keeping Communist party members from defense facilities. 389 U.S. at 284-85. (White, J., dissenting). Justice White did not disagree with the majority, however, with respect to the proper level of scrutiny. He noted that although the right of association is not absolute, "official interference with First Amendment rights has drawn close scrutiny." Id. at 283 (emphasis added).

The Court has also upheld military regulations when narrowly drawn and justified by compelling military interests. In Brown v. Glines, 444 U.S. 348 (1980), and Greer v. Spock, 424 U.S. 828 (1976), the Court rejected First Amendment challenges to regulations requiring that commanders approve petitions before circulation on an Air Force base (Brown) and political speeches and literature on an Army base (Greer).

In both cases, the Court stressed the importance of the military interests at stake and pointed out that the regulations restricted only speech that was reasonably necessary to protect those interests, speech that was "a clear danger to the loyalty, discipline or morale of troops," Greer, 424 U.S. at 840, or was "likely to interfere with [the] vital prerequisites for military

effectiveness," Brown, 444 U.S. at 354.* See also United States v. Albertini, 53 U.S.L.W. 4844, 4848 (June 24, 1985)(excluding holders of bar letters from military bases promotes "important governmental interest in assuring the security of military installations").

* Application of strict scrutiny in Brown and Greer is consistent with cases in which civilian authorities restricted Free Speech rights. In United States Civil Service Comm'n v. National Assoc. of Letter Carriers, 413 U.S. 548 (1973) and Broadrick v. Oklahoma, 413 U.S. 601 (1973), the Court upheld federal and state statutes regulating political activity by federal and state employees. In Broadrick, Justice White referred specifically to application of the strict scrutiny standard in First Amendment cases:

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.

Broadrick v. Oklahoma, 413 U.S. at 611-12 (citations omitted).

Second, as a matter of policy, military regulations that compel action contrary to religious conscience should be subject to the most exacting standard of judicial review. Underlying strict scrutiny is the Court's recognition of its special role as the guardian of citizens who depend upon fundamental constitutional rights as a bulwark against majoritarian tyranny. See United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). The need for judicial vigilance does not stop at the military base gate.

To the extent that "the different character of the military community and of the military mission requires a different application of those protections," Parker v. Levy, 417 U.S. 733, 758 (1974), the strict scrutiny standard is sufficiently expansive to accommodate the special needs of the mil-

itary. The least restrictive alternative -- compelling state interest mode of analysis permits the military, in the right case, when its interests are held overriding, to prevail. See e.g., United States v. Albertini, supra; Brown v. Glines, supra; Greer v. Spock, supra. Because strict scrutiny permits proper deference to military purposes, there is no reason to exempt the Air Force from its searching judicial inquiry.

Despite this Court's consistent application of strict scrutiny to Free Exercise cases, the Court of Appeals below inexplicably rejected strict scrutiny and based its legal analysis in large part on Rostker v. Goldberg, 453 U.S. 57 (1981). Rostker, however, has no relevance to this case.

In Rostker, plaintiffs alleged gender-based discrimination. Here, petitioner alleges governmental restraint of

fundamental Free Exercise rights. In Rostker, the Court applied the less restrictive heightened scrutiny test for gender-based discrimination. See, e.g., Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981);. Craig v. Boren, 429 U.S. 190 (1976). Here, as demonstrated above, the well-established test for government restraint of Free Exercise rights is strict scrutiny. Although, like this case, Rostker arose in a military context, the salient feature of Rostker is that it involved gender-based discrimination for which a test more lenient than strict scrutiny has been held appropriate.

Rostker, then, is plainly not the general "standard of review ... designed for evaluating asserted clashes between individual rights and governmental powers ..." Goldman, 734 F.2d at 1536, that the Court of Appeals read it to be. Rather, Rostker is

simply the most recent in a line of cases utilizing heightened, but not strict, scrutiny to test gender-based discrimination. As such it is inapposite.*

B. The Air Force Cannot Demonstrate A Compelling Interest in AFR 35-10

To uphold AFR 35-10, this Court must find that forbidding Air Force personnel from wearing an unobstrusive yarmulke while indoors serves a compelling interest. Both the record evidence and relevant case law suggest otherwise.

* Even if Rostker did apply here, its rationale does not undercut petitioner's case. In Rostker, the Court held that Congress acted constitutionally when it authorized the draft registration only of men. The Court reached that conclusion primarily because Congress' decision to exempt women was carefully reasoned and deliberate, based on hearings, floor debate, and because "Congress specifically considered the question of the Act's constitutionality." 453 U.S. at 64.

In contrast, AFR 35-10 was promulgated without benefit of wide-ranging debate (Congressional or otherwise), nor was its constitutionality specifically considered. The deference accorded to the vigorously debated Congressional action in Rostker is wholly inappropriate to the administrative regulation at issue here.

1. The Air Force's only interest in AFR 35-10 is strict enforcement of its arbitrary style of dress uniformity

The Air Force advanced several specific arguments at trial in support of AFR 35-10.* The Disrict Court rejected all of them, and the Court of Appeals credited only the Air Force's interest dress uniformity.

* For example, the safety issue raised at trial -- that an unauthorized hat could fly into a jet engine and cause it to explode, Goldman, 734 F.2d at 1539 -- has little to do with this case, which concerns wearing a yarmulke indoors. In any event, the threat of flying yarmulkes is easily solved by a variety of fasteners. Cf. Menora v. Illinois High School Association, 683 F.2d 1030, 1035 (7th Cir. 1982)(constitutional challenge to rule forbidding basketball players from wearing headgear).

Another argument raised below, that the Air Force would be flooded with requests for myriad exceptions to uniform requirements, has no factual basis in the record. Although no one can know just how many persons would seek an exemption, it seems unlikely to be more than the number of Sabbatarians who claim the protection of Sherbert v. Verner, supra, or Thomas v. Review Board, supra. This argument is based on little more than idle speculation, hardly sufficient to constitute a compelling interest.

The Air Force's strict enforcement of its uniformity regulations serves the military interest of "identification and indoctrination into instinctive obedience" and fosters the teamwork, motivation and discipline necessary for an effective fighting force. Goldman, supra, 734 F.2d at 1540. Exceptions to its uniform requirements, the Air Force urges, would create resentment among those forced to adhere strictly to the regulations, thereby undermining morale. Id.

The particular provision of AFR 35-10 at issue -- permitting no yarmulke indoors -- serves no substantive military purpose in itself.* Rather, it is strict enforcement of a regulation to insure dress uniformity, regardless of the form the Air Force decides (even arbitrarily) that uniformity should take, which serves the military interest.

* The arbitrary nature of AFR 35-10 is discussed in detail in Section C, below.

2. The Air Force's strict enforcement of its arbitrary style of dress uniformity is not a compelling interest

Neither law nor logic permit strict enforcement of the Air Force's arbitrary style of dress uniformity to be deemed "an overriding governmental interest," United States v. Lee, supra, 455 U.S. at 257-58, sufficient to justify restraint on petitioner's Free Exercise rights. There is no bright line test for determining when a governmental interest becomes "compelling." But comparing the interests of uniformity in this case, with the interests at stake in those cases in which the Court has required deference to military judgment, illustrates vividly the relative triviality of the uniformity issue.

In Chappell v. Wallace, 103 S.Ct. 2362 (1983), the Court refused to provide enlisted military personnel a Bivens-type remedy against superior officers. Reasoning that such a legal remedy could not avoid

affecting the very foundation of military command, Chief Justice Burger stated that:

> the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be underminded by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command.

103 S.Ct. at 2367.

The obvious and direct threat to a critical element of military life -- chain of command -- in Chappell, contrasts sharply with the tenuous connection between wearing a yarmulke and undermining discipline, as claimed in this case. That tenuous connection attenuates even further in light of the record evidence that petitioner wore a yarmulke, without any incidents of resentment by fellow officers or enlisted personnel or objections by superiors, for over three years. Goldman, supra, 739 F.2d at 1533 (Starr, J., dissenting).

Also instructive is Parker v. Levy, 417 U.S. 733 (1974). There, an Army captain, who was a physician, was court-martialed for disobeying orders and for "conduct unbecoming an officer and a gentleman." The Court upheld the court-martial, holding that, in the military context, the regulations under which Captain Levy was tried were not unconstitutionally vague or over-broad. In reaching its decision, the Court noted that:

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

417 U.S. at 758 (emphasis supplied). The inapplicability to this case of Justice

Rehnquist's reasoning in Parker becomes apparent upon close comparison of the facts in both cases.

Both this case and Parker involve a captain working in a hospital who disobeyed a superior's order. There, the similarity ends. In Parker, the captain refused to perform his assigned duty of conducting a dermatological clinic for other soldiers. Here, petitioner received outstanding evaluations of his work. In Parker, the captain made public statements that promoted "disloyalty and disaffection among the troops." 417 U.S. at 738. Here, petitioner's very job involved ministering to his fellow soldiers' health, seeking to make them better, more effective soldiers.

In Parker, Justice Rehnquist emphasized that "fundamental" military interests may outweigh First Amendment rights.

The Court held that Captain Levy -- by neglecting his duties and counselling disloyalty -- may have materially threatened such "fundamental" military interests. To suggest, here, however, that Captain Goldman's wearing a yarmulke in violation of uniform regulations similarly threatened fundamental military interests is contrary to common sense. The Air Force's interest in enforcement of its particular style of dress uniformity is simply not "overriding" or an "interest of the highest order." Wisconsin v. Yoder, supra, 406 U.S. at 715.*

* Captain Goldman is also in quite a different position from the physician who unsuccessfully challenged the Army's refusal to grant him an officer's commission because he refused information as to his membership in allegedly subversive organizations in Orloff v. Willoughby, 345 U.S. 83 (1953). Nor does petitioner suggest the kind of radical alteration of the military command structure sought by plaintiffs, and rejected by the Court, in Gilligan v. Morgan, 413 U.S. 1 (1973). The kinds of compelling interests in Orloff (the need for loyal officers) and Gilligan (the need for military control over troop mobilization) are qualitatively different from the interest of dress uniformity present in this case.

Kelley v. Johnson, 425 U.S. 238 (1976) and United States v. Lee, 455 U.S. 252 (1982), which the Solicitor General cited as authority in his Brief in Opposition to Petition for a Writ of Certiorari at 4-10, do not dictate a different conclusion.

In Kelley the Court upheld as constitutional grooming standards for policemen, which, as here "ultimately reduced to uniformity for uniformity's sake." 425 U.S. at 243. But there are two distinctions which make Kelley inapposite to this case.

First, Kelley did not involve a fundamental First Amendment right, but rather a claim based on a Fourteenth Amendment "liberty" interest in "matters of personal appearance." 425 U.S. at 244. Such an interest does not demand the same strict scrutiny required for restraint of a Free exer-

cise right. Second, Kelley involved a police force, not the military. Justice Rehnquist pointed out specifically that cases involving the "unique judicial deference" accorded to the military were inapposite in Kelley, 425 U.S. at 246. Accordingly, Kelley does not control this case.

In United States v. Lee, a member of an Amish group sought an exception from the social security tax on employees, claiming that imposition of social security taxes violated his Free Exercise rights. The Court, applying strict scrutiny, held that because "the broad public interests in maintaining a sound tax system is of such high order," the Free Exercise rights must yield. 455 U.S. at 259-60. The Court pointed out that, unlike Wisconsin v. Yoder, permitting religious exceptions to the tax code "would be difficult to accommodate" and would "ra-

dically restrict the operating latitude of the legislature." Id. at 259.

The far-ranging implications of accommodation in Lee are not present in this case, as they were not in Yoder. A threat to the proper operation of the tax system strikes at the heart of the nation's ability to function -- a more compelling interest could hardly be imagined. A minor exception to an Air Force uniform regulation hardly strikes at the heart of the Air Force's ability to function -- as petitioner's more than three years of wearing a yarmulke without incident demonstrates.

The analytical thread running through these cases -- Chappell, Parker, Orloff, Gilligan and Lee -- is strikingly clear. When a fundamental First Amendment right interferes with a compelling govern-

mental interest, that First Amendment right must give way. But those interests must be "of the highest order," and it does violence to the language and intent of these cases to include enforcement of the Air Force's arbitrary style of dress uniformity as such a compelling interest.

C. AFR 35-10 Is Not The Least Restrictive Means of Achieving Uniformity

Assuming, arguendo, that strict enforcement of dress uniformity were deemed a compelling interest, the Air Force must still demonstrate that AFR 35-10 is "the least restrictive means of achieving" that uniformity. Thomas v. Review Board, supra, 450 U.S. at 718. See United States v. Robel, 389 U.S. 258, 268 (1967). The Air Force has made no such demonstration.

AFR 35-10 already allows visible deviations from total uniformity, permitting visible rings and bracelets of non-uniform

design, as well as non-uniform undergarments and ornaments that are not visible (such as a Masonic ring or a crucifix worn under a shirt). Goldman, supra, 734 F.2d at 1540. Therefore, permitting petitioner to wear an unobtrusive yarmulke would not entail abandoning a rule of absolute dress uniformity, but merely an incremental broadening in the scope of deviation from uniformity already permitted. Such a minor shift in the scope of deviation from uniformity -- strictly enforced, of course -- would not affect AFR 35-10's purpose of enforcing uniformity.

The current regulation is thus more restrictive than necessary to achieve its purpose. The Air Force can achieve its purpose of enforcing AFR 35-10 and still accommodate petitioner's Free Exercise rights by a minor adjustment of its arbitrary rule. If Air Force regulations currently permit non-uniform, visible rings and bracelets,

surely the proper functioning of the Air Force could withstand petitioner's unobtrusive yarmulke.*

The Air Force offers no reason why its uniform dress regulations should permit visible, non-uniform rings and bracelets, but not yarmulkes. According to the Court of Appeals, that absence of a reasoned basis is irrelevant, because Air Force regulations are "necessarily arbitrary." Id. The Court of Appeals concludes that the Air Force's judgment, in permitting some exceptions to total uniformity, "is entitled to deference" despite its arbitrariness and lack of rational basis "because it is within its expertise and outside ours." Id.

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* The Air Force argues that amending AFR 35-10 to permit yarmulkes will cause significant problems of morale and discipline. The Air Force treats this case as if the only issue involved were the propriety of granting exemptions. But that is not necessarily so, as the Solicitor General observed in his (cont'd)

The Air Force's unwillingness to move its arbitrary, and unnecessarily restrictive, line of dress uniformity slightly so as to include yarmulkes is wholly without reasoned basis. It is impossible to improve

(cont'd)
Brief for the United States as Amicus Curiae in Jensen v. Quaring, 53 U.S.L.W. 4787 (U.S. June 17, 1985)(per curiam). In his brief, arguing that the State of Nebraska need not grant an exception to one person who did not want her photograph taken for a drivers license, the Solicitor General stated:

> If the State can accomplish its objective equally well by adopting a less restrictive alternative applicable to the populace as a whole, then it may be appropriate to require the State to adopt that alternative in the case of a particular plaintiff.

Brief for the United States at 3.

In this case, the Air Force "can accomplish its objective equally well" by, for example, requiring all personnel to wear hats indoors (as AFR 35-10 now requires security personnel to do). Uniformity of dress will be served, and petitioner accommodated.

upon Judge Starr's argument in response below:

> The panel ... justifies this manifest infringement of First Amendment liberty by the military's need for uniform adherence to an admittedly arbitrary rule .... The military's claim that flexibility generates resentment, whereas arbitrariness keeps the corps content, is utterly belied by Dr. Goldman's own experience .... Not a scintilla of evidence in the record suggests that his wearing of a yarmulke caused any resentment whatever in others .... The claim is contradicted by expert testimony credited by the trial court, that making exceptions to accommodate deeply held religious beliefs would defuse rather than cause resentment. The claim is also at odds with common sense. Reasonable servicemen would more justly be annoyed with the mechanical enforcement of arbitrary rules that prevent the wearing of such unobstrusive symbols of religious faith while allowing others to wear religious rings and bracelets. The vice inherent in an arbitrary rule of this kind is that it does not offer to one who falls on the wrong side of the line any reason for the disparate treatment from which he or she suffers.

Goldman, supra, 739 F.2d at 659 (Starr, J., dissenting) (emphasis in original).*

* As Judge Starr points out, the Air Force's resentment argument is counter-intuitive. The common sense response that Judge Starr advances is echoed, albeit in a fictional work, by Pulitzer Prize winning author William Styron, who chronicles in a soon to be published novel the non-regulation idosyncracies of a Marine Corps Colonel:

> Both the Jerry Colonna moustache and the [silver-inlaid Colt .38] revolver were nonregulation; moustaches were allowed but they should not be recherche, and the standard issue sidearm was a .45 automatic. The automatic, it was commonly noted, was not really reliable, and hard to aim (though once aimed it could pulverize an ox). But it was less for this reason that Halloran sported his more glamorous sidearm -- and the flamboyant handlebar -- than the dash and style to which his status as a legend entitled him. The Marine Corps is rigorous, even Prussian, in many of its fetish-like requirements, but there is something affectingly lackadaisical in its tolerance of reasonable eccentricities shown by favored oddballs; unlike the Prussians, the Marines, thanks to this good-natured view, have been helped in saving themselves from dementia.

W. Styron, Love Day, 104 Esquire 98 (August, 1985).

D. This Court Should Not Defer To Arbitrary Restraints on Free Exercise Rights that Discriminate Against Orthodox Jews

As noted above, the Court of Appeals panel ruled that it must defer to military regulations concerning military discipline, even if arbitrary, merely because such judgments serve some purported military interest. The Court of Appeals rationale is dangerous in the extreme.

First, deference to an admittedly arbitrary regulation is tantamount to abdication of "the judiciary's limited but important function in the extraordinarily delicate environment of military personnel." Goldman, supra, 739 F.2d. at 658 (Starr, J. dissenting). If the Air Force decided that teamwork, motivation, discipline and the like would be served not simply by uniform dress, but by uniform religion -- would that judgment be entitled to deference? If the

Air Force decided that its military effectiveness would be enhanced by having only white officers -- would that judgment be entitled to deference?

Second, deference to a purely arbitrary dress regulation, the content of which is justified solely by the need for some (perhaps, any) dress regulation, would constitute an unconstitutional religious gerrymander in this case. Although, on its face, AFR 35-10 is not explicitly discriminatory, it effectively prohibits Orthodox Jews from wearing yarmulkes. AFR 35-10 permits, however, Christians to wear religious ornaments under their shirts (such as a crucifix), or Masons to wear Masonic rings.

AFR 35-10, then, works a de facto discrimination against Orthodox Jews. When government actions, however unintentionally, draw lines which burden Free Exercise

government must be able to demonstrate "a neutral, secular basis for the lines [it] has drawn," Gillette v. United States, 401 U.S. 437, 452 (1971). Because the Air Force makes no such showing here, AFR 35-10 is an unconstitutional religious gerrymander.*

* Accommodation of petitioner's Free Exercise right here will not constitute a prohibited establishment of religion. The constitutionally mandated concern for religious liberty embodied in the Free Exercise Clause permits government to adjust its regulations in appropriate circumstances to prohibit discrimination against the religions practices of minorities. See Estate of Thornton v. Caldor, Inc., 53 U.S.L.W. 4853, 4856 (June 26, 1985)(O'Connor, J., concurring); Sherbert v. Verner, 374 U.S. at 409.

CONCLUSION

AFR 35-10 tells Orthodox Jews that they are unwelcome in the Air Force. The interest this regulation serves -- strict enforcement of uniformity -- is hardly sufficiently compelling to override petitioner's Free Exercise right. Amici urge the Court to hold unconstitutional the wholly arbitrary line drawing of AFR 35-10 that permits the Air Force, without reason, to reject the patriotic desires of Orthodox Jews who seek to serve their country.

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

Ronald A. Krauss
Counsel of Record
Lois C. Waldman
Marc D. Stern
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500

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